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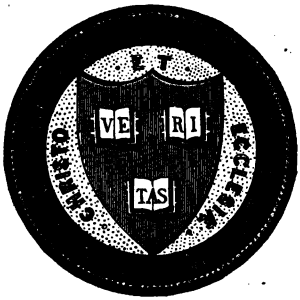

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WHAT IS CONTRABAND OF WAR

AND

WHAT IS NOT.

COMPRISING

ALL THE AMERICAN AND ENGLISH AUTHORITIES

ON THE SUBJECT.

BY

JOSEPH MOSELEY, ESQ., B.C.L.,

BARRISTER-AT-LAW.

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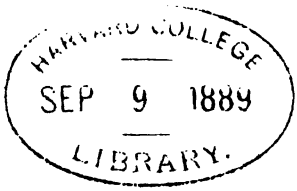

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PREFACE.

WHAT is contraband of war and what is not are always questions of great legal importance and interest. And with the large trade which continues to be carried on by the States of North America, now unhappily engaged in civil war, with our chief mercantile communities, and West Indian and Canadian colonies, it is manifest that they must soon thrust themselves prominently upon the commercial world, and so upon the legal community. It may not be amiss, therefore, to institute a few inquiries in this somewhat difficult question of jurisprudence, not only with a view of collecting the cases, and arranging and evolving out the principles of the authorities on it, for the use of the profession, but also to afford practical information for those more immediately interested. For since all vessels sailing for the ports of belligerent states are liable at any moment to be overhauled and confiscated for having goods contraband of war

on board; and since the catalogue of what articles are contraband is so large, and embraces many matters the least of all suspected to be such, and since the circumstances under which even these will or will not be contraband are so capricious, it is clearly of importance to the commercial circles to know what matters are forbidden to traffic by the laws of war and what are not.

With the object of making the work as practical as possible, I have kept as clear as was compatible with my task of the learned *opinions* of the Jurisprudentists, and have adhered closely to the *decisions* of judges, especially those of Sir William Scott, and the writings of such men as Story, Kent and Wheaton. Those only who have looked into the learned and ingenious writers of the seventeenth century on International Law, who all, as to the question of contraband of war, were influenced by the prejudices of the times and country in which they wrote, can form any idea of the stupendous state of doubt and difficulty legal science can attain to. They only can appreciate the difficult task which Sir William Scott performed when, in view and contemplation of all these, he delivered those remarkable

decisions contained in Robinson's Admiralty Reports, which reduced to principle, order and authority what had theretofore been a confused mass and of conflicting wisdom and ill-digested learning.

My work has been a simple one, namely, of arranging those decisions in their natural and proper order, and, when thus prepared, of squeezing out of them such further corollaries, inferences, axioms, deductions and maxims as they could be fairly made to yield; and by the aid of these, both as in themselves and in combination with the original decisions, in solving all such other questions as presented themselves during the investigation of the subject. With what success it is for others to decide.

To better effectuate this I have adopted, in addition to the ordinary method of legal treatises, a somewhat novel plan of reducing the principle of the various cases on any given point into the form of a legal aphorism, and of placing it at the commencement of each chapter, to serve alike as a guide to, and as a reduction within the narrowest limits of, its contents. Legal maxims were much in vogue in former times, both as a means of inculcating as well as of expounding the principles of law. And as

the analytical results or primary elements of things are always more portable, and capable of a more universal application, than the things themselves, and as it has appeared to me that this principle might be applied to law, and the use of proverbial philosophy advantageously restored to it, I have adopted it systematically throughout the whole of this work.

J. MOSELEY.

3, CROWN OFFICE ROW, TEMPLE,
Aug. 1861.

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WHAT IS CONTRABAND OF WAR.

CHAPTER I.

ON WHAT LAW IT DEPENDS.

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By whom Question to be decided.
Depends on the Law of Nations—to be decided in Prize Courts.
The American and English Interpretation of that Law the same.
Governments bound by that Law.
The Prize Courts of a Country belong to Foreigners as well as the Subjects thereof.

Difficulty of the question.

WHAT is and what is not contraband of war has long been a question of difficulty, not only in the Cabinets of jurisconsults but in those of diplomatists and statesmen—not unfrequently superinducing a supplemental war to that already raging—as occurred between England and the United States in 1812. Grotius says, "*Nam et olim et nuper de ea re acriter certatum* "*scimus cum alii belli rigorem alii commerciorum* "*libertatem defenderent*" (*a*). So, according to

(*a*) Grot. de Jur. Belli et Pacis, lib. 3, cap. 1, p. v. 1.

a learned American authority, "In attempting to define what are contraband goods of "war, the authorities vary or are deficient in "precision, and the subject has long been a "fruitful source of dispute between neutral and "belligerent nations" (*b*).

The decision lies always with the Prize Court of the captor, and that decision is to be arrived at by reference to the law of nations, which is binding on all civilized countries. And though each country has the right of, and, in fact, does interpret for itself what that law is, yet this is done by reference, and obedience to certain known opinions and writings of the Jurisprudentists, which are accepted and acted on by all as authorities in the matter. As regards the States of North America, this branch of the law is peculiarly well defined and accessible to English lawyers. The ablest modern writers on International Law,—Kent, Story, Wheaton, Flanders and Parsons,—are Americans. These, by the high standing of their works and the copious investigation of the subject, aided by and based upon the opinions of Grotius, Bynkershoek, Valin, Hubner, Vattel and other writers, and especially upon the well-known decisions of Sir

American and our laws the same.

(*b*) 1 Kent, Comm. 142.

William Scott, afterwards Lord Stowell, have pointed out, and, as it were, strictly compromised, if that were necessary, the American Courts of Justice and statesmen to a known and already fixed path of jurisprudence.

But more than this. By an Ordinance in 1781, as previously in 1775, the American Congress formally adopted the law of nations as its guide in all questions of contraband of war and prize (*c*). And, on the authority of Judge Story, in confirmation of the known course of the Courts, and the constant practice of authors, "the rules of the British Courts of "Admiralty, as far as the cases have arisen to "which they would apply, have been formally "recognized and enforced by the Supreme "Courts of the United States" (*d*). So that it may even be said that we are quite competent to decide here what will be held in any given case by their Courts out there; or, at least, as far as their own lawyers are, and as far as it is possible to forestal a judicial decision, since we draw our wisdom from the same

(*c*) 1 Kent, Comm. 1, note.
(*d*) Story's Notes to Wheaton's Admiralty Reports in Pratt's edit. p. 15. See 1 Kent, Comm. 147.

fountain head, and do homage to the same authorities.

Governments bound by that law.

And there is no reason to suppose that the course thus marked out by the most learned and esteemed authorities of America, and by its own legislative acts, will be swerved from. Notwithstanding some violent propositions that have been made, the governments of the belligerent states, in all their recent diplomatic relations with the representatives of foreign powers, have professed to act, and, so far as they have gone, have really acted in strict conformity with it. No doubt but that they, the same as others, and as the Queen in Council in this country, have the right of making such orders and issuing such instructions for regulating the proceedings as to prize and contraband of war, and what shall be considered such, and they shall think proper. But, as Lord Stowell said, in relation to similar proceedings in England, "It is not inconsistent with the "freedom of the Courts to follow the law of "nations, because such orders and instructions "are drawn up in pursuance of it" (*e*). And it is the duty and practice of governments in

(*e*) Edwards' Jurisdiction of Admiralty Court, p. 240.

such cases to follow the opinions and decisions of its legal officers. As said by the same authority elsewhere:—"The Prize Court in this "country belongs to other nations as well as "our own, and what foreigners have a right to "demand from it is, the administration of the "law of nations simply, and exclusively of the "introduction of principles borrowed from "our municipal jurisprudence"(f). So it is said to be the duty of the Prize Court to administer the law of nations to the subjects of other countries (g).

Prize Courts belong to foreigners.

(f) *The Recovery*, 6 Rob. 341.
(g) *The Fox and others*, Edwards' Adm. Rep. 311.

CHAPTER II.

ORIGIN OF THE RIGHT OF.

Origin of the Right.
The Rights of Belligerents to interdict Supplies to an Enemy.
The Rights of Neutrals to trade with Nations they are in amity with.
The Question of Contraband lies in the Conflict of these two Rights.
The division of the Subject by Grotius.
By Modern Law is Question of Evidence.

Origin of the contraband of war.

THE question of contraband of war arises from the conflicting claims, having their origin in the conflicting interests of belligerents and neutrals in times of hostility. The former insist that

Rights of belligerents to interdict supplies.

they have a right to prevent all supplies that can increase the powers of offence and defence from going to an enemy, and that, by any attempt to convey such goods, the party makes himself thereby one of them, and liable to be treated as such by having his goods seized. And if this appear a little harsh, they contend that, since it is not possible, or even probable, that a belligerent will succeed in intercepting contraband in all cases, when he does, he is driven to make an example, by confiscation, in

order to deter those parties and others from a like offence.

Rights of neutrals to trade.

To these general principles the advocates in favour of neutral privileges assent, but they insist that, as they are no parties to the quarrel, their natural right to trade with either of the belligerent states, with whom they at least are still in a state of amity, must be respected, and not interfered with beyond what is absolutely required by the real necessity of the case. And, therefore, that a belligerent's interdiction and confiscation must be strictly applied to such goods as are directly of assistance in the maintenance of the war, and only to such; and that any mere disposition to annoy an enemy, or to cripple his resources generally, must not be indulged in to the wanton injury of themselves, by depriving them of a customary market for their goods, or interfering with their usual trade.

Difficulty lies in the conflict of these two principles.

And these propositions belligerents in their turn admit, and it is one to which the North American States, when neutrals, in the war at the close of the last century, especially gave adherence to in the broadest sense. And thus the whole difficulty is in ascertaining what are such goods as can be fairly said to contribute to

increase the powers of aggression and defence of a people. Contraband or not contraband lies in the point of contact or conflict, as it were, of these two sets of principles, representing respectively the rival interests of belligerents and neutrals; and it is precisely as the one or the other set are held to predominate, in any given case, that the decision will turn.

Grotius' division of the subject.

Grotius, with a view of adjusting the question for the more easy solution of its perplexities, divides all goods and merchandize whatsoever, as considered for this purpose into three classes: 1st. Those things which only have their use in war as arms, to which category must now, no doubt, be added ammunition, without which arms are useless. 2ndy. Those things which in war have no use and serve for pleasure. And, 3rdly, those things which are useful both in war and out of war, as money, provisions, ships, and all things which are used in them. Of the first class he says, that whoever supplies them to the enemy is himself to be accounted as an enemy. Of the second class, that it gives no cause of complaint. Of the third class, that it is of doubtful use, and will be contraband according to the circumstance of each case. As if a town be besieged, corn and pro-

visions supplied to it will better enable the besieged to hold out, and are thereby contraband of war, though otherwise not. And this classification is still generally adopted (*h*). But so far as it seeks to determine the character of goods as contraband or not by certain fixed rules, and by reference chiefly, if not entirely, to the nature of the goods themselves, it must be taken to have undergone important modifications.

By modern law is question of evidence.

The tendency of all the recent authorities, both in works written on the subject and in judicial decisions, especially the decisions of Sir William Scott, goes to show that contraband or not contraband of war is a question of evidence to be determined in each case by reference, not to one particular rule of law, but many; not to any one fact, however strong that may be, but to all the circumstances connected with the goods in question. It is not only, or not so much, whether the goods are, as in themselves or as belonging to a class, capable of being applied to military or naval use, but whether, from all the circumstances connected with them, those very goods are or are not destined for such use.

(*h*) See *per* Sir William Scott, 1 Rob. 194.

CHAPTER III.

AS DEPENDS ON PLACE OF EXPORT.

Rule: Natural Produce, Neutrality, and Nationality make Free Goods.
Whether Goods must be the Natural *Produce?*
Applies to all Goods not Contraband in the first Degree.
The Producing Country must be Neutral.
What may be said to be the Producing Country in such cases.
Must belong to a Native.
Proof of Country and Ownership.
Will not be liable to Confiscation, though going to a Blockaded Coast.
But will if going to a Port of Naval or Military Outfit.

But since, whatever may be the nature of an article, whether it will be contraband of war or not, will depend, in a great many cases, upon the country from which it is exported, and still more upon the character of the port to which it is destined. And since a full consideration of these points will be demanded, in every instance it will be advisable, for the more easy unfolding of our subject, to advert to these first.

And the first general rule which is deducible from the cases and authorities on this point is this:—

Natural produce, Neutrality, and Nationality make free goods (*a*). General rule.

That is, that the natural produce of a neutral country, shipped by a native, will be protected from confiscation at least. This maxim, in favour of neutrals, arises from that natural right above adverted to, that their interest is not wantonly to be sacrificed to that of belligerents, by having the usual and customary markets for their produce closed to them.

In order to come within its scope, the goods must be actually the produce of the neutral country from which they are shipped, and it will not be sufficient for them to have been only warehoused there, and so constructively to be part of the commerce of the place (*b*).

Whether goods must be natural produce.

And so far as the decided cases go it must be the *natural produce* of the country, or goods manufactured out of it, and in the same country, as sailcloth from Russian hemp made in Russia, and masts from Swedish timber made in Sweden, as in the case of *The Neptunus* (*c*); and this gives rise to a very important question to a manufacturing country like England. For

(*a*) This might be called, perhaps, the rule of the three N.'s.
(*b*) *The Twee Jufferen*, 4 Rob. 243.
(*c*) 3 Rob. 108.

it may be said that all produce is manufactured to some extent, and is of no use till it is; and it thus becomes only a question of degree in these and in all other cases. And the principle upon which the more favourable consideration is granted to goods, as the staple natural produce of a neutral country, as above stated, namely, that the people of such a country are not needlessly to be deprived of a fair and usual market for their produce, will apply as much to produce in manufactured goods as to produce in tilling the soil. And there seems no reason why produce, or the profitable result of labour and skill of the manufacturing population of a neutral, should not be entitled to the same privilege as to the produce or profitable results of skill and labour employed by the agricultural populations.

Applies to all goods not contraband in the first degree.

But, provided that the article be the natural produce of the neutral country, the nature of the article is not important, and so strong is the rule, that, even though it be of the nature of contraband in the first degree, in some few specified instances, it will be protected. Thus, pitch and tar from Sweden, which are goods, *per se*, universally contraband, as declared by Sir William Scott in the chief case, were held

by him liable only to pre-emption, that is, to be taken only on payment of full value (*c*), if exported on that voyage from the country in which they are produced (*d*). And if these, so of course to all other articles of a similar or less degree of contraband (*e*). But generally the rule will not protect goods which are directly contraband in the first degree, as masts of vessels going to a port of naval equipment (*f*). So sailcloth, as contraband in the first degree, will not be protected, though exported from Russia, where the material was grown and the article manufactured, and going to a port of only general equipment (*g*). The fact of such goods being bound to a port of naval equipment would not be of much importance, perhaps, though mentioned in the case, as such articles of marine stores last above named (*h*), as well as arms and ammunition, are contraband of war on a destination to any port of an enemy (*i*).

Producing country must be neutral.

And, as appears by the terms of our general

(*c*) *Vide post*, tit. PRE-EMPTION.
(*d*) *The Twee Jufferen*, 4 Rob. 245.
(*e*) See *post*, titles MARINE STORES; PROVISIONS.
(*f*) *The Staadt Embden*, 1 Rob. 31.
(*g*) *The Neptunus*, 3 Rob. 108.
(*h*) *Vide post*, tit. MARINE STORES.
(*i*) *Vide post*, titles ARMS and AMMUNITION.

rule, the goods must also be the produce of a *neutral country*.

For, if it be the enemy's territory, as where wine was taken in a neutral ship going from one port of the enemy to another of his ports of naval equipment, where the wine would probably be used as *munitions de bouche* for victualling ships, it was held liable to confiscation (*k*). And the Supreme Court of the United States decided, in the case of *The Commercen*, that a neutral vessel carrying provisions, neutral property destined for the use of the enemy, and being of the growth of the enemy's country, was liable to confiscation, and the provisions also (*l*). And the producing country means the surrounding country, of which the shipping port of those particular articles is the general port of embarkment, and it need not be strictly a political part of it. Thus, where goods, the produce of Poland, were shipped from Dantzic, which is a free city, though only under its protection, it was held that the goods were the produce of the shipping port (*m*). The produce need not be shipped in vessels belong-

What may be said to be the producing country.

(*k*) 4 Rob. 70.

(*l*) Wheaton's Admiralty Cases, cited in 1 Kent's Comm. 144.

(*m*) *The Juffrow Wabitha*, cited in 4 Rob. 163.

ing to that country, if in any other neutral ship it will be sufficient (*n*).

Proofs of a country.

The proof of the goods being the produce of the country from which they are exported lies with the claimant, and must be made in the first instance (*o*), but not if such goods are the staple produce of that place. Thus pitch, in the case above referred to, would be taken to be the produce of Sweden if going from that country, but not if going from East Friesland, or any other part of Prussia, where it is not a general produce. The presumption would be rather the other way, and the goods condemned as prize, unless proved to be the produce of Prussia (*p*).

Goods must belong to a native of it.

So, also, the goods must belong to a subject of the producing country (*q*). And proofs of this must be given. Where hemp, sent from Russia, was shipped for neutral "account," as appeared by the ship's papers; it was held not to appear to belong to Russians more than any one else (*r*).

Goods not liable though destined for a blockaded coast.

And provided that the articles otherwise come within the terms of the rule and are not abso-

(*n*) *The Apollo*, 4 Rob. 159.
(*o*) *The Twee Jufferen*, 4 Rob. 243.
(*p*) *Ibid.*
(*q*) *The Neutralitet*, 3 Rob. 297.
(*r*) *The Apollo*, 4 Rob. 165.

lutely contraband in the first degree, it will apply, and this even though they be on a voyage to a blockaded coast. It was on this principle that the United States of America, during the war with us and France, insisted on the right of their vessels laden with corn, the produce of their country, to enter the French blockaded ports and coasts, and which was virtually conceded by the English government, in its agreeing to take such cargoes when seized only on payment of value (*s*). And Sir William Scott decided, that such a practice was in accordance with the universal law of nations, and did not depend upon any mere treaty with one particular state (*t*). And the argument that was used by the British government, namely, that by cutting off the external supplies of the enemy they would reduce them to scarcity and want, and thus sooner compel them to submission, must thus be taken to be abandoned both by the Americans and ourselves, for the reasons then put forward, that such arguments could only apply to places regularly invested and cut off from all communication, and not to a whole coast line with

(*s*) See Kent's Comm., 1 vol. 142, 8th edit.
(*t*) *The Haabet*, 2 Rob. 182.

an open country beyond it. The United States government have frequently declared that the treaty, by virtue of which this arrangement was made, was strictly in compliance with the law of nations (*u*).

Though in that case the rule was only contended for as applicable to provisions, corn and flour, which happened to be the only commodities of a similar degree of contraband which the Americans were interested then in exporting to the belligerent states, the same rule will, no doubt, apply to all cases of natural produce which are not contraband in the first degree, that is, not arms, ammunition, and marine stores, absolutely contraband (*x*).

But if goods within the general rule, as to natural produce, will not be liable on an attempt to enter a blockaded coast, it is not quite so clear that they will not be liable on an attempt to enter a port of naval equipment. The two chief cases decided by Sir William Scott on this subject, *The Staadt Embden* (*y*) and *The Neptunus* (*z*), leave this point

But not if destined to port of naval equipment.

(*u*) See authorities cited in Kent's Comm., 1 vol. 138, 5th edit.

(*x*) *Vide post*, titles ARMS and AMMUNITION; MARINE STORES; also, tit. PROVISIONS.

(*y*) 1 Rob. 31.

(*z*) 3 Rob. 108.

open, as the port in both instances was not strictly one of naval armament. On principle it would, no doubt, be giving too great a preponderance to the interest of neutrals to hold that they were entitled manifestly to recruit the resources of an enemy for carrying on the war, by sending supplies to them, which, from the character of the place, a strong presumption arises that they would be applied to military use. This case is much stronger than the mere attempting to enter a blockaded coast, because there the presumption is not more in favour of their being applied to military or naval than for general consumption. And the argument used by belligerents as to coast blockades is, not that they hope to reduce the military power, that is, the parties to whom they are presumedly sent, by such restriction on the supply of provisions, but the whole nation by the deprivation and hardships they are put to. And many of the cases decided by Sir William Scott imply, perhaps, if they do not decide, that such goods going to ports of naval equipment will be liable as contraband (*a*).

And the most perfect good faith must be

(*a*) See *post*, tit. PORT OF DESTINATION, and tit. PROVISIONS.

observed in all the ship's proceedings and her papers, and her course all correct and without suspicion, to entitle the goods to this privilege (*b*).

(*b*) *The Sarah Christine*, 1 Rob. 241; and *The Yonge Margaretha*, 1 Rob. 194; *vide post*, tit. BONA FIDES.

CHAPTER IV.

AS DEPENDS ON PORT OF DESTINATION.

General Rule as to effect of Port of Destination.
2nd General Rule—Reasons of, and Cases exemplifying.
Vessel must be on her Voyage to interdicted Port.
Where change of Destination is by force of Circumstances.
Difference of the American and English Authorities.
Where change of Destination made by Captain.
What may be said to be Port of Destination.

WHETHER goods will be contraband or not depends still more upon port of destination. And the general rule or canon deducible from authorities and cases on this subject is this:—

General rule. *Doubtful goods of a doubtful power, bound to a doubtful port, will be free.*

Or the goods of a doubtful character, that is, serving both for peace and war, of a subject of a doubtful or neutral power, bound to a port of a doubtful, that is, of a general and non-naval description, will not be liable.

2nd General rule. And, on the other hand, *all such goods bound to a naval port will be contraband. See Addenda (A), as to objections and French Law.*

The reason of the law in the first general rule is, that, from the character of such goods and port of consignment, no inference or fair presumption arises to show that they are destined more for peace than war, and that, therefore, a neutral's original right to trade with a power in amity with him is not to be interfered with. Indeed, since the consumption by a large community for the purposes of peace are so much greater than those of war, of such articles as serve for both, even in the highest states of hostility, the presumption, if either way, would for that reason alone be in favour of such goods being intended for peaceful purposes. Nor is this right weakened by any argument that such goods are serviceable for war, and *might* be applied to such intents. The whole law of contraband of war requires that some fair evidence or presumption must be shown that those very goods were then actually destined for warlike purposes, whenever it is sought to render them liable to confiscation.

And the reason or grounds of the rule are well shown by the exceptions and distinctions made out of it. For the moment any additional facts arise which counterbalance or overrule the presumptions of the innocence of the goods, or

give rise to new ones of the goods being really intended for hostile use, as, if there be any concealment or fraud on the part of the captain or owners about the ship's real destination, or about the real nature of the goods, the first presumptions will be overruled.

The second general rule, namely, that goods of a double character and capable of serving both for peace and war, if on a voyage to an enemy's port of naval equipment, will be liable to confiscation, and the reasons on which it is founded are thus stated by Mr. Kent in his Commentaries (*a*), as deduced from the ancient and modern writers on the subject:—"The "most important distinction is, whether the "articles were intended for the ordinary use of "life, or even for mercantile use, or whether "they were going with a highly probable desti- "nation for military use. And the nature and "quality of the port to which the articles are "going is not an irrational test. If the port be "a general commercial one it is presumed that "the articles are going for civil use, though "occasionally a ship of war may be constructed "there. But if the predominant feature of that "port, like Brest in France or Portsmouth in

(*a*) Vol. i. p. 143, 8th ed.

" England, be that of a port of naval or military " equipment, it will be presumed that the arti- " cles were going for military use, though it is " possible that the articles might have been " employed for civil consumption. As it is im- " possible to ascertain positively the final use " of an article *ancipitis usus*, it is not an inju- " rious rule which deduces final use from im- " mediate destination; and the presumption of " a hostile use, founded on its destination to a " military port, is very much inflamed if, at the " time when the articles were going, a con- " siderable armament was notoriously preparing, " to which a supply of those articles would be " eminently useful."

Leading cases and examples.

The leading case in the English law on this point, and one exemplifying and establishing those principles is *The Yonge Margaretha* (*a*), where it was held by Sir William Scott, that Dutch cheeses, and no doubt all like articles, used as marine provisions, such as salt beef, salt fish and pork, if going into Brest, a port of naval outfit, would be contraband, though the same goods, if going into Bordeaux, which is a general port, though even some small vessels of war are built and fitted out there, would have

(*a*) 1 Rob. 194.

been held not contraband. So it was held by the same learned authority, that tallow, which is considered an article of naval use, if going to a port of special naval equipment like Brest, would be contraband, but otherwise if going to a port of general commerce like Amsterdam, even though that was also a port both of mercantile and naval equipment (*b*). But sailcloth, as a special article of naval equipment, would be contraband going to any port. And the same principle runs through the whole of the decisions on contraband of war, and perpetually presents itself for consideration.

Goods must be actually going to naval port.

From the moment of quitting a port on a hostile destination the offence is complete, and it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port (*c*). But where, between the starting of the vessel and her arrival at her destination, the colony to which she was going with a contraband had changed hands and become British, she was held not in fault, for the vessel was not "in delicto" (*d*). But the vessel must be actually sailing to an hostile port; for where the captain, on hearing that a blockade had been established to the port he was going to, changed his course,

(*b*) *The Neptunus*, 3 Rob. 108.
(*c*) *Per* Sir W. Scott, in *The Imina*, 3 Rob. 168.
(*d*) 6 Rob. 392, note.

and it was argued that the goods were contraband and under orders for a hostile port, Sir William Scott held that they were not taken *in delicto*, and restitution was ordered (*d*).

Change of destination by force of circumstances.

If the deviation from an interdicted port be by the force of the elements or by other compulsory power, as if her deviation be owing to her having been taken by the enemy, her original destination will be presumed to be that to which she is still going as that to which she would return when she has the power (*e*).

American authorities differ.

The American authorities, however, have held otherwise. According to them, a ship driven by stress of weather into a prohibited port, or into an open port with prohibited articles on board, or into a port strictly blockaded, or into a port of a free country with slaves on board, or be carried in by unlawful force, in neither of these cases is forfeiture incurred, or any change wrought in the condition of the persons or things (*f*). And the American government, through Mr. Webster, in 1842, insisted on this right, even as to vessels with slaves on board; and the same was formerly decided by their Courts in

(*d*) *The Imina*, 3 Rob. 169.
(*e*) *The Minerva*, 3 Rob. 231.
(*f*) Flanders, page 49, citing Webster's Diplomatic and Official Papers, page 85.

Maccayo v. *New Orleans* (*g*). And, no doubt, if the original destination, or cargo and destination of the vessel taken together, were lawful, uncontrollable circumstances driving her into an unlawful course would not infect her with illegality, for the intention to commit an offence against the law of nations would be wanting, and the rule of civil law, *actum ex intentione agentis æstemandum est*, would apply. And if a vessel with goods on board, serving both for peace and war, and going to a general port of the enemy, were really driven by force of the elements, or other compulsory power, to a port of naval equipment, or into a blockaded port of the enemy, she would not be contraband for that reason, namely, because, to a necessary part of the offence, that of going into a naval port, consent was wanting. So, if a vessel with goods directly contraband of war, as arms and ammunition on board, but not originally bound to an enemy's port, only to a neutral port, but driven there by the weather, the unlawful intention would also be wanting—that of going to the enemy's country; and the mere fact of her being there with contraband on board would avail nothing. But this would not be so if she

(*g*) Flanders, page 49.

had originally an unlawful intention of going there with contraband, or was engaged on an unlawful traffic, namely, carrying slaves to any port from the coast of Africa; for the original offence would be complete in itself, and no part be owing to external force, which would, in such case, only have the effect of throwing the delinquent into the hands of justice, not of making him commit an offence, or part of an offence, against his will.

Change of destination by the captain.

And if the port of primary destination have been an innocent port, but the vessel be thence sent on to a port of naval equipment, she will be prize if taken (*h*). Also held, that if left to the captain to go to one of two ports, one of which is a forbidden one, and he be taken on his course to the innocent one, he will not be liable to confiscation. But Sir William Scott decided that if it be left to the opinion of the captain to go to a forbidden port or not, and his going there is "eventual" and "possible," all the legal consequences will follow if the forbidden port be his actual port of destination (*i*). So, where the captain was left to decide whether he would sell the vessel to the

(*h*) *The Twende Brodre*, 4 Rob. 38. See also 4 Rob. 93, and 5 Rob. 262.

(*i*) *The Richmond*, 5 Rob. 336.

enemy or to get a freight, it was treated as if the orders were to sell (*k*). If the captain of a vessel deviate into a blockaded port from a legitimate course, or otherwise compromise the vessel by his conduct, as a general rule the owners will be bound by his act, and the vessel be liable as prize (*l*). But if for no legitimate cause, that is, no cause in which he had authority to decide, it will be otherwise (*m*). Where the captain, retracting a former assertion, admitted that he was going to an interdicted port, it was held by Sir William Scott that his employers were bound by that admission (*n*). The owners have a right against the captain in such case (*o*). But the act of the captain does not bind the *cargo*, unless the owner be the owner of the ship or privy to the intended violation of the law, or the master be his agent (*p*).

What is the port of destination.

A port like Corunna, from its close proximity to Ferrol, which is clearly a port of naval equipment, will be held also a port of naval equipment (*q*). Where one port "was on the

(*k*) *The Brutus*, in App. to Vol. V. Rob. Reports.
(*l*) *The Adonis*, 5 Rob. 256.
(*m*) See *per* Sir W. Scott, in *The Imina*, 3 Rob. 168.
(*n*) *The Mars*, 6 Rob. 86.
(*o*) *Ibid.*
(*p*) Story's Notes, p. 72.
(*q*) *Per* Sir William Scott, in *The Zelder Rust*, 6 Rob. 95.

opposite side of a projecting headland or promontory, so as not to admit of an immediate communication, except by land carriage, with another," held not to be (*q*).

And by the term "port of destination," is meant, the real port she is going to; not the mere one entered on the ship's papers. And it has been held, that if a vessel be found going, or known to be going, to the enemy's country, though her papers are regulated for a neutral one, it will work a forfeiture of the ship as well as of the cargo. This was decided by Sir William Scott in *The Franklin* (*r*), overruling his previous decision in the *Sarah Christina* (*s*). And the same was also held by him in the case of *The Edward* (*t*), where an elder brother of the Trinity House was examined as to whether the ship was in her right course. And if a vessel of a neutral power, and with papers all correct, be out of her regular course with no reasonable explanation, as, if a vessel nominally bound for Lisbon from Hamburgh be found deep in the Bay of Biscay, and making for the Spanish coast, an enemy's country, with con-

(*q*) *Per* Sir William Scott, in *The Zelder Rust*, 6 Rob. 95.
(*r*) 3 Rob. 217.
(*s*) 1 Rob. 237.
(*t*) 4 Rob. 68.

traband of war on board, the goods and the vessel will be confiscated, that being fair presumptive evidence of a false destination being entered on her books (*u*).

(*u*) *The Franklin*, 3 Rob. 217. See *post*, tit. BONA FIDES.

CHAPTER V.

AS DEPENDS ON THE NATURE OF THING.

Grotius' First Rule and Bynkershoek's Objections.
How far Goods must be solely *applicable to War.*
Goods directly applicable to Purposes of War.
Difference between raw Goods and manufactured Goods.
The Court will deal with the real Character of the Goods.
How it obtains Evidence of, in doubtful Cases.
The Effect of belonging to First or Second Degree of Contraband.

BEARING in mind, therefore, that whether goods, in any given case, will be contraband of war will depend much upon the country from which they are exported, and the character of the port to which they are destined, it now becomes necessary to consider how far they will be contraband, or not, as considered in themselves. And for this it will be advisable to advert, first, to those general principles which apply more or less to all cases alike, and afterwards, to consider goods as contraband of war under such different heads as they more naturally arrange themselves.

Grotius' rule. Bynkershoek's objections.

And the general principles contained in Grotius' Rules, already pointed out (*a*), must

(*a*) *Ante*, p. 8.

be taken as still in force, subject to the modifications there insisted on, and those which we shall now advert to. And one very important condition of the first rule is, that all articles that are sought to be brought under it, and rendered liable to all the consequences of being so, is, that they should be "solely" applicable to purposes of war. And this would seem reasonable; for, since the consequences of belonging to that class, is, that no other evidence than that which appears as in themselves and their being on a voyage to an enemy is required of their being intended for hostile application, it would seem unfair, without that condition to render them liable to such an arbitrary rule entailing such serious consequences.

But difficulties and distinctions have nevertheless been made as to it. Bynkershoek has raised some apparently well-founded objections by suggesting that, if everything is to be prohibited that can be used in war, the catalogue would be large indeed:—"*Si omnem ma-*
"*teriam prohibeas ex quâ quid bello aptari*
"*possit, ingens esset catalogus rerum prohibi-*
"*tarum, quia nulla fere materia est ex quâ non*
"*saltem aliquid bello aptum facile fabrice-*

"*mus*" (*b*). So, he again says, that materials essentially of war, as ammunition and gunpowder and arms, are extensively used in peace, as for sporting, and powder for mining operations :—"*Enses gestamus ornamenti causa, "gladiis animadvertimus in facinoros, et ipso "pulvere bellico utimur pro oblectamento et ad "testandum publicè lætitiam*" (*c*).

But it will be observed that all notice of one very important qualification in Grotius' rule above adverted to, that contained in the word "*solely*" applicable for war, is left out of view. And this makes a wide distinction; for the catalogue is very small of things only applicable to war, and those are very limited in quantity compared to those used for the purposes of peace and war; whilst the class applicable to such purposes of war, and others as well, is very numerous. And this consideration would also seem to dispose of the second objection he raises. For swords used as ornament are not articles *solely* applicable for war, nor are cannon, which are used for public rejoicing. Both articles in that particular case are shown to be of a double

(*b*) Bynk. Quæst. Pub. Jur. lib. 1, c. 10.
(*c*) *Ibid.*

use, and therefore would seem to belong to the second class laid down by Grotius.

How far goods must be solely applicable to war.

This second objection, however, seems to be countenanced by modern practice and decisions. For instance, all marine stores, such as ship-timber, sails and cordage, which are equally applicable to building vessels of commerce and vessels of war, are nevertheless treated as contraband of the first class—at least, by the English and American Courts and authorities, and, sometimes, by the French authors also. And horses and harness, and saltpetre, have been declared by treaty, by the English and Americans, as contraband in the first degree, though clearly not within Grotius' definition (*d*).

These cases, as well as being contrary to the letter of the law of Grotius and the Jurisprudentists, seem, indeed, to form an exception to the general tenor of the modern law of nations, which is, to relax the actual rules in favour of commerce and neutral rights. And indeed, upon principle, as the law now stands, it seems difficult to hold that such things as horses and saddles, of all things, perhaps, those most capable and likely of a general and peaceful application, as being contraband of war in the

(*d*) *Vide post*, pp. 36, 44, 47, 59.

first degree; that is, things that are to be taken as solely applicable in war, or as so conclusively destined for that purpose from their own nature as to require no other evidence of such a destination. And the French Prize Courts refused to condemn a cargo of ship-timber as contraband of war, where it appeared to be of an ordinary character, and there was nothing to show that it was intended more for naval than for commercial ships (*e*). And Mr. Wheaton, in his Law of Nations, seems to express an opinion in favour of that decision (*f*). So that, notwithstanding the law as it stands in the English and American Courts on the subject (*g*), the question must be considered, perhaps, as opened up, and, with the ever constant tendency in favour of trade and neutral goods, it may be doubtful how far that law can be maintained thus, as it is manifestly against known general principles, and the law, as laid down by Grotius and the Jurisprudentists and foreign Courts. And whether all goods that cannot be said strictly to be *solely* applicable to war, as cannon, cannon balls, bombs, bayonets, &c., should not be con-

(*e*) *The Volante*, decided in 1807, cited in Kent's Comm., 1 vol. 136.
(*f*) See Wheaton's Law of Nations.
(*g*) See Kent's Comm., 1 vol. 135.

sidered as contraband only in the second degree; and that the moment it is fairly shown either from the nature of the article itself or from other evidence, that however much it technically belonged to the first class, that in point of fact it was fairly capable, and possibly intended, for another and peaceful object, it would be necessary to give some further evidence to rebut the presumption which would then arise. *See further consideration as to this, Addenda* (*B*).

Articles directly applicable. Manufactured and raw goods.

And in addition to the rule of Grotius as to articles being exclusively applicable to war, in order to be liable in the first degree as contraband, the modern law, as expounded by Sir William Scott and others, must be taken to have engrafted another test as to goods being at all, or, if so, how far conclusively belonging to that class, or indeed to the second class also. That test is, of their being made, fitted and manufactured for warlike purposes, and being immediately applicable for that purpose. A learned French author on this subject has also added this condition to that of Grotius, as being required by the French law (*h*). The origin of this rule, no doubt, is that of most others on this subject, namely, the greater and

(*h*) Ortolan, Règles Internationales, vol. 2, p. 165.

more conclusive proof it establishes of the intended use of the goods. For goods, even those perhaps applicable only for purposes of war, and certainly those so generally used for it as to give rise to a strong presumption that all such are destined for hostile purposes, if in their raw and unmanufactured state, according to Sir William Scott, will not be contraband, or at least contraband in an equal degree, and without some further evidence than that contained in themselves (*i*). Thus, though masts of ships on the voyage to an enemy's country are contraband in the first degree and under all circumstances (*k*), yet timber, twenty feet long, intended for making into masts by joining, would not be contraband (*l*). So, though unwrought iron is not contraband at all, even if going into a port of naval equipment; yet if made into anchors or other ships' stores, it will be contraband in the first degree (*m*). So ships fitted up as ships of war, as if they be pierced for guns and have shot lockers, rings and eye-

(*i*) *The Yonge Margaretha*, 1 Rob. 182; Kent's Comm., 1 vol. 183, 8th ed.; Story's Notes on Admiralty Cases, page 72.

(*k*) *The Staadt Embden*, 1 Rob. Rep. 31.

(*l*) *Arguendo* in the *Imina*, with the apparent approbation of the Judge, 3 Rob. 167.

(*m*) *The Regende Jacob*, 1 Rob. 92.

bolts, be on the road to an enemy's country, they would be contraband in the first degree (*n*). But in two cases where the vessels were not fitted perfectly for war, though under very strong suspicions, they were restored (*o*). So, though copper in bar, or in sheets not of a thickness as to be available for sheathing ships, is not contraband, yet if manufactured of a form and nature to be immediately adapted to sheathing vessels, it will be liable to confiscation (*p*). *See further, Addenda* (*C*).

And articles which in their raw state would not be contraband at all, will become contraband in the second degree, if in their manufactured state they are fitted for war. Thus, raw provisions which will not keep are not contraband, yet, if salted, so as to become fit for marine stores, they become contraband (*q*). And goods contraband in a lesser degree will become contraband in a deeper sense, in proportion as they are more prepared for immediate use for military or naval equipment. Thus, corn made into flour and hemp made into cord-

(*n*) *The Richmond*, 5 Rob. 331; *The Brutus*, 5 Rob., App.
(*o*) *The Fanny* and *The Neptune*, cited in 5 Rob., App.
(*p*) *The Charlotte*, 5 Rob. 275.
(*q*) Kent's Comm., 1 vol. 143, 8th ed.; *The Yonge Margaretha*, 1 Rob. 194.

age, are contraband in a higher degree than in their natural state (*r*).

The law will deal with the real character of the goods. Evidence of.

And the law, in order to get at the fact, whether the goods in any given case are intended for warlike destination, will take any and every fact into consideration, and in one case Sir William Scott even admitted the character of the owner of the goods as a person known to be connected with contraband trade of war.

And it will not be satisfied with any mere superficial appearances and the mere apparent character of an article, but will search it out and deal with it in its real nature. Thus, where a cargo of hemp was taken which, as a marine store, would be universally contraband, and liable merely as hemp to confiscation, yet, when on a suggestion to that effect, it was referred to competent persons to decide, and on its being certified to be unfit for naval stores, and such as was not generally used in naval dockyards, it was restored (*s*). And it was Sir William Scott's practice to refer all articles of a doubtful character as to their applicability for warlike purposes to persons of experience, and

(*r*) *The Yonge Margaretha*, 1 Rob. 194.
(*s*) *The Gute Gisselschaft Michael*, 4 Rob. 94.

to abide by their decision (*t*). On the other hand, articles to all appearance not contraband, if, upon a close inspection and reference to skilled persons, they prove to have some little peculiar attribute specially adapted for it, this, with other circumstances, as going to a port of naval equipment, will make them contraband. Thus, though unwrought iron is, as a general rule, not contraband, yet if proved on examination by competent individuals to be peculiarly adapted for ship building, it would be liable to condemnation (*u*).

The effect of belonging to first or second degree of contraband.

And the effect of belonging to the first or second degree of contraband is very important. In the former case the goods will be liable to confiscation upon no other evidence than that afforded by themselves on inspection; whereas, in the latter, further reasonable evidence will be required of their being intended for warlike use, of which their going to a naval port is an important but not the only one: any other fact that fairly makes out that point is equally available.

(*t*) *The Charlotte*, 5 Rob. 275; *The Regende Jacob*, 1 Rob. 92.

(*u*) *Per* Sir William Scott, in *The Regende Jacob*, 1 Rob. 92.

CHAPTER VI.

ARMS AND AMMUNITION.

General Rule as to.
Must be things directly as well as solely applicable to War.
What are Arms and Ammunition.
Lead, Iron, Copper and Tin, not Contraband.
Sulphur and Saltpetre.
Gun Barrels, Gun Locks and Stocks.

THESE, as things "solely used for war," as we have already seen, are contraband in the first degree; that is, things contraband as in themselves, and without any further proof of a warlike destination than that afforded by mere inspection; and the rule as to them may be stated thus.

Arms and Ammunition, or all things solely and directly applicable in war, on the road to an enemy, are contraband. Rule.

It matters not from what country, or port, or to what port they are going, so long as the latter be an enemy's. They are things so essentially contraband as to be entirely without the privileges and conditions adverted to in the third and fourth chapters of the work. But

the primâ facie evidence thus afforded by themselves, as being arms or ammunition, as below observed, is not conclusive; and if, from the nature of the arms, it were clear that they were only intended for sport, diversion, or as articles of ornament and luxury, they would be free, or at least further proof would be required, as to their warlike destination, the same as in other articles of a double application, and as in the case of the court swords, and cannon used for public rejoicing, adverted to by Bynkershoek (*a*).

And this, as all other rules against contraband, must contain the condition of their being on the *road to an enemy*, because arms even may be sold by a neutral in his own territory to an enemy, even though known to be destined for the purpose of war against his friend. And all attempts to restrain this, which have often been made, have always failed, and been contrary to the law of nations. But it is not necessary, perhaps, that the vessel should, apparently or nominally, be going there, if she be really and actually on such a destination. And it was held by the Supreme Courts of the

(*a*) *Vide ante*, p. 33.

United States, in the case of *The Commercen* (*b*), that if goods are on the road to a neutral country, in that case Spain, but for the avowed and manifest use of the enemy's army, the English army then in Spain, they would be contraband.

What articles come generally within the description of arms and ammunition may be judged of from the categories or lists which have frequently been drawn up and inserted in treaties on the subject.

By Article 18 of the Treaty between Great Britain and the United States, signed 19th November, 1794:—"In order to regulate what is "in future to be esteemed contraband of war, "it is agreed that, under the said denomination "shall be comprised all arms and implements "serving for purposes of war, by land or by sea, "such as cannon, muskets, mortars, petards, "bombs, grenades, carcasses, saucisses, car- "riages for cannon, musket-rests, bandoliers, "gunpowder, matches and saltpetre; ball, pikes, "swords and head-pieces, cuirasses, halberts, "lances, javelins; horses, horse-furniture, hol- "sters and belts, and generally all other imple- "ments of war." And this treaty, though it

(*b*) 1 Wheaton, Admiralty Rep. 392.

expired as to this article, has frequently been declared by the American statesmen and lawyers a true declaration of the law of nations on those subjects it extends to (*c*).

And by treaty signed between Great Britain and Russia at St. Petersburg, in June 5, 1801, "in order to avoid all equivocation or misun-"derstanding as to what ought to be considered "contraband of war," the two crowns declared, "that they acknowledged as such the following "articles only: cannons, mortars, fire-arms, "pistols, bombs and grenades, balls, bullets, fire-"locks, flints, matches, gunpowder, saltpetre, "sulphur and cuirasses, pikes, swords and sword-"belts, knapsacks, saddles and bridles, except-"ing the quantity of the said articles which "may be necessary for the defence of the ship."

In the Treaty of 1786, between France and Great Britain, Article 22, and by the Treaty between the United States and Holland, October 8, 1782, horses and harness were declared contraband of war, and soldiers also in the latter treaty.

These treaties have frequently been considered by publicists and writers on the subjects as declaratory of what the law is, and so

(*c*) *Vide ante*, p. 36.

as binding on nations not parties to them. But this is somewhat a forced construction perhaps, since it frequently happens that such treaties are in the nature of compromises, and merely conventional arrangements as between the parties to them, in which each yields a little for the sake of a peaceful solution, rather than any absolute declaration of the law on the subject. Indeed, a treaty on any given subject intimates, that the subject was in doubt, and the placing it in the treaty seems to imply that otherwise it would not be thus, or at least suggests it as uncertain. It is manifest, also, that some of the articles included in the above treaties as contraband of war, that is, in all cases when going to an enemy, can scarcely be regarded in that light in modern times.

Lead, iron and copper.

By the Treaty of Utrecht, between France and England, renewed by that of Aix-la-Chapelle in 1748, and by the Treaty of Paris in 1763, and by that of Versailles in 1783, and by the commercial treaty with France in 1786, the list of contraband is strictly confined to munitions of war; and all naval stores provisions, "and all other goods which have not "been worked into the form of any instru- "ment or furniture for warlike use by land or

" by sea, are expressly excluded from the list." This points to the condition we adverted to, and means all articles unmanufactured, or raw materials, however capable they be by further labour of being applied to warlike purposes, are not to be contraband. And unwrought iron, and no doubt steel in bars or other rough condition, was formally decided by Sir William Scott not to be contraband. So lead and tin have been always mentioned in the treaties on this subject, above referred to, as not contraband, though the former is manifestly an article of necessary and very general use in war for ammunition. But if made into ammunition no doubt it would be contraband. Sir William Scott, in one case, allowed evidence to be given of unwrought iron being of such a description as was generally used for making an article of marine store, with a view to declaring it contraband (*d*). But this is manifestly a somewhat loose and dangerous rule, and unless the article be a " speciality," or of such a very peculiar nature as to afford a conclusion, or very strong evidence of a warlike destination, a very dangerous one to act on.

(*d*) *Vide post*, tit. MARINE STORES; IRON AND COPPER.

Sulphur and saltpetre.

With respect to these articles, there is much difficulty in deciding whether they come within the definition of ammunition, so as to render them liable, in the first degree, as to all the consequences of such. They are excluded from that rule, perhaps, from their being raw materials and not directly applicable to warlike purposes. And again, as being things of doubtful or double use, they would belong to the second class.

On the other hand, it is observed by Mr. Wheaton, a great authority, that the almost unanimous authority of elementary writers, of prize ordonnances and of treaties agrees to enumerate among that (that is, contraband of war) all warlike instruments, or materials *by their own nature* fit to be used in war. Saltpetre was inserted as contraband in the first degree, that is, as liable to confiscation on the road to an enemy, in the treaty between the United States and England in 1795, before referred to, which the statesmen and writers of America have insisted on as declaratory of the law of nations. But such articles were generally excepted, and declared not contraband of war, in the treaty of Utrecht, and those in confirmation of it. They were both, however, again inserted

as contraband in the treaty between England and Russia in 1801. As things clearly of a doubtful or double use, however much they may be required for and specially adapted for war, it is, no doubt, better to consider them as of the second class of contraband where no treaty exists (*e*), and to render them liable to confiscation, to require some other proof, which for such goods need not be very strong, of a warlike destination. *See Addenda* (*D*).

Gun-barrels, gun-locks and stocks.

No doubt all articles partially prepared for a warlike application, or forming parts of warlike implements, as gun-barrels, gun-locks, as mentioned in the last-mentioned treaty, sword-blades, bomb-shells, if not filled or completed, and gun-carriages would come within the list of contraband of war in the first degree, as arms and ammunition, since the nature of such articles clearly indicated them as applicable to warlike purposes, and to no other; or even if not directly and immediately, yet very nearly so, and so far so as to exclude them in their then state from any other use. It might be said, perhaps, that gun-locks and gun-barrels in such state would be applicable to fire-arms

(*e*) So held as to brimstone, 2 Acton's Appeals, 11.

for diversion and sport. And, unless something appeared from their make to indicate them as intended for war, as, if the barrels were fitted for the fixing a bayonet or with other such apparatus, some further evidence would be necessary, as with all other articles of a double use. But little, no doubt, would be enough, and the quantity in which they were supplied to one customer at one time would be sufficient.

CHAPTER VII.

SHIPS.

What Ships when Contraband.
General Rule.
Ships of War about to be sold to Enemy.
Whether Vessels of an indefinite character are Contraband.
Ships acting as Transports are Contraband.
When Ships carrying contraband Goods are Contraband.

Ships, when contraband.

AND not only arms and ammunition, but, in a maritime war or war between maritime powers, ships fitted up as armed vessels, and also those serving as transports for troops, and even mercantile vessels under certain circumstances, are contraband of war in the first degree, and as such liable to confiscation. And the general rule as to this is very simple, and may be stated thus:—

Rule.

A friend's ships in a foe's service are foes.

And it is not necessary that the vessel be actually then in the service of the foe if there be fair evidence that she is about to enter it. Nor even in such case, actually on her voyage, if she be not under the protection of a neutral port. And the moment she has left even a

neuter's port she will be liable to be seized, and the captors need not wait till she nears her destination (*a*).

Thus, a ship sold to or on its way to be sold to the enemy, as proved by the admission of the captain to third parties of her destination to the enemy's ports, coupled with the fact of its having been originally built as a ship of war, and peculiarly adapted for such, and concealment of and prevarication as to its intended voyage, was held by Sir William Scott to be liable as contraband (*b*). And the same was held by him in the case of *The Brutus*, where a vessel, built at Salisbury, in Massachusetts, and pierced for fourteen guns, though with five only mounted to defend her against privateers, with shot-lockers, rings and eye-bolts, and then under orders for a voyage to the Havannah, an enemy's port, with directions to the captain to sell her, or take goods on freight, at his discretion, but that the owners preferred his selling her, was condemned and confiscated as prize (*c*). And the evidence against the vessel as sold or about to be sold to the enemy need not be of any particular kind, so long as it fairly bears

(*a*) *Vide ante*, tit. As depends on Destination, p. 24.
(*b*) *The Richmond*, 5 Rob. 331.
(*c*) See App. to 5 Rob. Rep.

out that point. But it must do this satisfactorily, as also the fact of the vessel's being then actually fitted up for war (*d*). For in two cases, *The Fanny* and *The Neptune*, the Lords of Appeal set aside the condemnation of American vessels under very similar circumstances to the above, the evidence as to their being fitted for war and the trade in which they were engaged being of a more equivocal character (*e*). What the effect would be of a vessel sold or about to be sold to the enemy as a transport of men does not appear from any particular case, but on principle she would, no doubt, be liable as contraband.

Whether vessels of an indefinite character sold to an enemy are contraband.

And an important and somewhat difficult point presents itself here, namely, whether merchant vessels or large vessels without any definite character as to their fittings, and sold to or on a voyage to an enemy's country under ballast, or other presumption of being sold to or going on service to an enemy, are contraband. From the two first cases decided by Sir William Scott above mentioned, *The Richmond* and *The Brutus*, and the stress laid by him on the warlike character and fittings-up of

(*d*) *Vide ante.*
(*e*) *Ibid.*

the vessels, it would appear that, but for that evidence of a warlike purpose, the vessels would not have been contraband. And with respect to the two latter vessels, *The Neptune* and *The Fanny*, the evidence in favour of vessels being allowed to pass to an enemy, unless of a strictly hostile character, would be still stronger.

This absurdity, however, will exist, that whilst such vessels, all made and prepared, might pass free, the materials from which they were made, namely, ship timber, the masts, pitch, hemp and sailcloth would all be liable to be seized and confiscated without any evidence at all as the law now stands, as to their being intended more for ships of war than for commerce (*f*). It may be said, perhaps, that such things, so long as they remain in their unmanufactured state, are capable of being applied to warlike vessels, and may be presumed by a forced construction to be destined to that purpose, but that presumption no longer exists, when they are made up into vessels of commerce or vessels not vessels of war, and the cases may perhaps be reconciled on this principle, that there is a negative evidence in the one case that does not exist in the other. And

(*f*) *Vide post*, Chap. VIII.

whatever the incongruity there be from the above cases, in which so much stress was laid on the gun fittings of the vessels and from the tendency of law in favour of neutrals, vessels of a commercial character, or without any definite character at all, on the road to an enemy's country, would, no doubt, now be held not to be contraband, without some further evidence of their being intended for naval use. And the fact of such vessels being new and the produce of the owner's country, and going on that voyage from the country where they were built, as the Clyde, the Thames, and St. John's, would no doubt be strong in their favour, in accordance with the rule of the three N.'s, laid down in our third Chapter (*g*). But, on the other hand, the fact of their being sold to or hired by, or on the road to be sold to or hired by, the enemy's government, would be fair evidence of intended service in war, as likewise of their being fitted up as transports, or otherwise prepared or fitted for special warlike use.

Vessels acting as transports, and in carrying contraband of war.

And not only vessels of war, but vessels acting as transports in carrying troops will be liable to condemnation as prize. Thus, where a

(*g*) See *ante*, p. 11.

vessel was under contract with the enemy to carry a number of officers and sailors and soldiers, although apparently private individuals, but who nevertheless were known, or ought to have been known, in their real capacity, she was held liable to confiscation (*h*). But otherwise if the contract had been with each individual for his passage (*i*). And it is said that a neutral vessel acting as transport in conveying troops of the enemy is liable to be seized, though she be compelled to do so by force. This part of the decision seems very questionable if it were compulsion really (*j*).

Where ships carrying, when carrying contraband, are contraband.

According to the approved modern doctrine, vessels carrying goods contraband of war are not contraband themselves, or liable to confiscation as a general rule (*k*). But vessels employed in carrying goods contraband of war to the port of an enemy will be liable as prize—both the vessel and goods, if the contraband goods and vessel belong to the same party (*l*). So the carrying of goods which are contraband to a port of naval equipment of the enemy,

Goods contraband.

(*h*) *The Friendship*, 6 Rob. 429.
(*i*) *Ibid.*
(*j*) See *The Carolina*, 4 Rob. 261.
(*k*) *Vide post*, tit. CONTRABAND, EFFECT OF, p. 90.
(*l*) *Vide post*, tits. CONTRABAND, EFFECT OF, and BONA FIDES.

coupled with the fact of having fraudulent ship's papers or other concealment of the vessel's destination, or any other conduct of bad faith, will work a forfeiture, not only of the goods but of the ship (*m*). *See Addenda, as to secreting Despatches.*

(*m*) See *post*, p. 90.

CHAPTER VIII.

MARINE STORES.

Ship Timber is Contraband in the first Degree.
Masts Contraband.
Balks and Deals, when Contraband.
Copper Sheets.
Iron, unwrought.
Sailcloth and Hemp.
Pitch and Tar.
Tallow and Rosin.
Vessels allowed moderate Stores.
Goods bought by proceeds of Contraband.
Captain bound to know the Cargo.

AND not only ships, but all articles serving for naval construction and equipment are contraband of war. And of these some are contraband in the first degree, that is, without any other proof of being intended for war than that manifested in themselves (*a*); and some only in the second degree (*b*). And the rule is this:— Ship's timber and marine stores contraband.

Ships and what ships are made from, in Contraband of war, is the same thing. Rule.

And no proof is necessary of their being destined for building ships of war rather than ships of commerce by the law of America

(*a*) *Vide ante*, p. 40.
(*b*) *Ibid.*

and England (*c*), at least of such goods as are contraband in the first degree. Sir William Scott, in *The Twende Brodre* (*d*), decided that ship timber was contraband of war as in the first degree. And the treaty with the United States in 1794, in the list of contraband, stated that whatever materials served directly to building and equipment of vessels, with the exception of unwrought iron and fir planks, should be considered contraband and liable to confiscation. That treaty, at least that part of it, expired at the end of twelve years; but, according to Mr. Kent, in his work on International Law, the United States Government has repeatedly admitted that, as far as it enumerated contraband articles, that it was declaratory of the law of nations, and that this treaty conceded nothing on the subject of contraband (*e*). And the American Government, according to Mr. Kent, has otherwise frequently conceded that the materials for the building, equipment and armament of ships of war, as timber and naval stores, were contraband (*f*).

(*c*) *Vide ante*, pp. 52, 53.
(*d*) 4 Rob. 36.
(*e*) Kent's Commentaries, vol. 1, p. 142, citing his authority.
(*f*) *Vide* vol. 1, p. 140, citing the diplomatic despatches of various American statesmen.

But that learned author seems to doubt, on the authority of the French law, as held in the case of the *Il Volante*, carrying ship timber of an ordinary character, not necessarily adapted only for ships of war, and not going to a port of naval equipment, if ship timber be necessarily contraband (*g*). And so far as the decided cases, as they now stand, go, the question, so far as it rests on the opinion and authority of modern American and other writers, is not free from doubt. And so far as it stands on principle and the general tendency of modern jurisprudence, is clearly the other way. *See Addenda* (*A*) *as to this.*

Masts.

And masts are contraband, and this in the first degree also, and whether going to a general port or one of naval construction, and even though from a country in which they are the natural produce of (*h*). The character of the port of export and import in such cases is not material (*i*). But it was said in arguing, apparently with the assent of the judge, that timber twenty feet long, which was only for *making* masts by joining, was not contraband, though

(*g*) *Ibid. Vide ante*, p. 35.
(*h*) *Per* Sir William Scott, in *The Staadt Embden*, 1 Rob. Rep. 31; and see also 5 Rob. 314.
(*i*) *Ibid.*, and the case there cited.

it would have been if it had been fit for masts as it stood; and this seems to be a distinction in accordance with established principle (*i*).

Balks. In one case, in which the point arose whether what are called balks from Narva are ship timber, it was held doubtful, and referred to the shipwrights of the Royal Yard in Yarmouth (*j*). In the subsequent case of *The Twende Brodre* (*k*), however, Sir William Scott held that they were not timber of naval construction so as to be contraband in the first degree, that is, to be liable to confiscation, without some further evidence of their being destined for war. But if they were going into Brest, as a port of essentially naval construction, or there were any other evidence of their being destined for war, they would of course be contraband (*l*).

Deal planks. Deal planks have several times been declared in treaties to be exceptions to other ship timber, as in the treaty with the United States in 1794, and several treaties with the Northern Powers,

(*i*) *The Imina*, 3 Rob. 167; and see Story's Notes on Admiralty Cases, p. 72, and authorities there cited, and *ante*, p. 36.

(*j*) 1 Rob. 23.

(*k*) 4 Rob. 36.

(*l*) *Ibid.* As to yards, tops, blocks, battens. See Addenda (C.)

and not to be contraband of war. That is in the first degree, no doubt; for, if they were proved to be on a destination to a port of naval equipment, since such timber is used for building ships, those two facts together, or any other evidence in addition to that, in themselves clearly would work a forfeiture. As before observed, treaties are generally considered as declaratory of the law of nations in this respect; and, as to the particular Treaty of 1794, that has been, as already twice observed, declared and acted upon by the American Government as such (*m*). And, no doubt, upon principle, as deals, so all other timber of a like general use, or *promiscui usus*, is not contraband in the first degree, but is liable to be so on proof of its being intended for ship-building or other military purpose. *See Addenda, as to other articles.*

Copper in sheets, fit for sheathing ships, that is, in its then state, is contraband in the first degree, though the produce of the country exporting it (*n*). Whether copper in sheets, but not of such thickness and size as generally used for that purpose, is contraband, was left doubtful in that case, but clearly not as accord- Copper sheathing.

(*m*) *Vide ante*, p. 58.
(*n*) *The Charlotte*, 5 Rob. 275.

ing to general principle, if not applicable for naval stores in its then state, it would not be contraband without other circumstances, as the port of destination, to make it so (*o*).

Iron. Unwrought iron is an article *promiscui usus*, and, even if going to a port of equipment, will not be held contraband at all, as it is applicable to so many and such various purposes (*p*). But if, on reference to persons of experience, it should turn out that the iron is such as is peculiarly used for marine stores, or in any way specially applicable, it would be held liable as prize (*q*). And, as we have seen, iron wrought up, as into anchors, and so of course any other marine store, is directly contraband (*r*).

Sailcloth. So sailcloth, as an article directly and exclusively adapted for shipping, is contraband in the first degree, and liable to confiscation, though going from the country where it is produced to only an enemy's port of general equipment (*s*).

Hemp and cordage. So also is hemp, and, still more so, cordage (*t*).

Where hemp, called torse or cordilla hemp,

(*o*) *Vide ante*, p. 36.
(*p*) *The Regende Jacob*, 1 Rob. Rep. 92.
(*q*) *Ibid.*
(*r*) *The Yonge Margaretha*, 1 Rob. 194.
(*s*) *The Neptunus*, 3 Rob. 108.
(*t*) *The Yonge Margaretha*, 1 Rob. 108.

was proved to be of such an inferior quality by certificate of the officer at Woolwich Dockyard, and as by no means fit for making rope or cordage for the use of Her Majesty's Navy or the Merchant Service, it was restored (*u*).

Pitch and tar are now generally contraband in a maritime war, and that in the first degree (*v*). But where they are the produce of the shipper's country they are liable to pre-emption, and not to confiscation (*x*). Pitch and tar.

Tallow only is contraband if going to a port of naval equipment, like Brest (*y*). But if going to a port of general merchandize, like Amsterdam, it will not be considered as a naval store (*z*). And this though it be a port of great mercantile and military equipment as well (*a*). But if going from a country of which it is the natural produce, according to the above cases as to pitch and tar, it would be restored. Tallow and rosin.

Rosin going to a port of general trade, as Nantes, is not contraband of war, but it would be if going to a port of naval equipment, as an

(*u*) *The Gute Gesselschaft Michael*, 4 Rob. 94.
(*v*) *Per* Sir William Scott, *The Sarah Christina*, 1 Rob. 241.
(*x*) *Vide ante*, p. 13.
(*y*) *The Neptunus*, 3 Rob. 108.
(*z*) *Ibid.*
(*a*) *Ibid.*

article much used there (*b*). But if the produce of the country from which it is exported, it would, no doubt, come under the same privilege as pitch and tar (*c*).

All vessels are allowed to carry such stores as are necessary for their use, but if found going to an enemy's port with an excess, will be condemned (*d*).

Goods bought by proceeds of contraband cargo.

And goods, though not contraband, yet if the proceeds of an outward cargo to enemy's country that was contraband, will be liable to be seized as prize, if the voyage were a distant one, as to the East Indies, and in which the voyage was conducted by the same persons, under one set of instructions, and the returns essentially connected with the outward cargo (*e*). But not in European voyages, where the master goes out on one adventure and receives at his delivering port new instructions, and further orders (*f*).

Captain bound to know his cargo.

And the captain of a vessel is bound and held to know what cargo he has on board. As where some sail-cloth, manifestly contraband, was made up in packages, and orders given in

(*b*) *Neustra Senora de Begona*, 5 Rob. 98.
(*c*) *Vide ante*, Chap. III.
(*d*) *The Richmond*, 5 Rob. 335.
(*e*) *Per* Sir William Scott, *The Nancy*, 3 Rob. 126.
(*f*) *Per ibid.*

the bill of lading not to open them, the captain and owners of the vessel were held liable for the consequences of having contraband on board (*g*). And the captain is not allowed to say that he has been deceived by the mate, or other officers on board, as to the cargo (*h*).

(*g*) 4 Rob. 199.
(*h*) *The Richmond*, 5 Rob. 333.

CHAPTER IX.

ENGINES, MACHINERY AND COALS.

Engines for propelling Vessels are Contraband in degree according to intended Use.
Machinery for making Arms and Ammunition.
Parts of Engines, Boilers, Shafts, Wheels, &c.
The Orders in Council of Feb. 15, 1854, too loose.
Coals, when Contraband.

Engines for propelling vessels contraband.

AND no doubt but that the principles which the law of nations, as it is expounded in this country, and by the Americans (*a*), has applied to arms and ammunition and to naval stores, will embrace all the modern inventions in machinery. And not only those which will range themselves as destructive implements under the class of arms and ammunition, but all those appliances which in modern times are used in propelling vessels. For, as said by a learned American authority, "it is the *usus bellici* which "determine an article to be contraband, and as "articles come into use as implements of war, "which before were innocent, there is truth in "the remark, that as the means of war vary, and

(*a*) *Vide ante*, p. 2.

"shift from time to time, the law of nations "shifts with them, not indeed by a change of "principles, but by a change in the application "of them to new cases, and in order to meet the "varying uses of war" (*b*). But, by the French law, as marine stores are not contraband unless proved to be intended for vessels of war (*c*), so no doubt machinery for propelling vessels would not be, unless proved from peculiar nature, or by other means to be intended for a hostile purpose. *See Addenda* (*C*).

Engines will be contraband in degree according to their purpose.

And all engines will be contraband in degree, according to the appliances for which they are intended. Thus, steam engines for propelling vessels will be of the same as all other appliances for constructing or propelling vessels, sails, masts and cordage, and, no doubt, be subject to the same general rules, that is, as contraband in the first degree, and liable to be confiscated under all circumstances, when taken on the road to an enemy's country (*d*). And this, by the English and American law, without proof of their being intended more for vessels of war than for vessels of commerce (*e*).

(*b*) Kent's Comm., vol. 1, 140, 5th ed.
(*c*) *Vide ante*, p. 35, and Addenda.
(*d*) *Vide ante*, p. 40, and *post*, tit. EFFECT OF.
(*e*) *Vide ante*, pp. 52, 53, and Addenda.

Machinery for making arms or ammunition.

And not only machines directly applicable to warlike purposes or to propelling vessels, but machinery for the making of arms or ammunition, as for rifling cannon, for twisting gun-barrels, or for cutting out the parts of locks, or for casting ammunition, or making bombs, will clearly be contraband of war in the first degree, if by their nature it fairly appears that they are intended for such purposes. And if this be only doubtful, if there be other evidence that, together with that as appears from themselves, will fairly make out that fact, it will be sufficient, and they will be liable to confiscation on the established principles of law.

Parts of engines, boilers, shafts, wheels, &c. contraband.

The Orders in Council of Feb. 15, 1854.

And not only engines but parts of engines will, no doubt, also be contraband of war. The Queen, by an Order in Council, dated the 15th February, 1854, after interdicting the export of all arms and ammunition from England, enumerated as belonging to that class of goods: "Marine engines, screw propellers, "paddle wheels, cylinders, cranks, shafts, "boilers, tubes for boilers, boiler plates, fire-"bars and every article or other component of "an engine or boiler, or every article which is, "can or may become applicable for the manu-"facture of marine machinery." The latter

words, "every article which is, can or may "become applicable for the manufacture of "marine machinery," are much too general, if it be intended by them to classify all such things as come within them in the same category, as arms and ammunition, and military and naval stores. For unwrought iron, for instance, would clearly be comprehended within their limits, and the things of all others the most likely to pass under, and perhaps to have been aimed at, and yet, as we have already seen, a thing that will not, without some special qualities, be contraband of war (*f*). So of lead and tin. For iron, as a thing not only as capable of, but as likely to be employed in, an infinite variety of innocent purposes, stand on a very different footing from what it is in boilers and boiler plates, and in which it is already dedicated and applied to an hostile one. So also the former words used in the same document, "things "judged capable of being converted into and "made useful in increasing the quantity of "military or naval stores," are open to the same objection as being too general, and such as would include many materials and numerous other things clearly not contraband, in the same class as those things which are enumerated.

(*f*) *Vide ante*, p. 62.

But all the articles there specifically enumerated, and all such as are only parts as it were of a whole which is contraband, are clearly contraband, like the scabbards and sword-hilts of Bynkershoek, which are so in the first degree, even by so great an advocate for the right of neutrals as he (*g*). And this because they are necessary parts to a thing which is contraband. Nor are they of use except as part of that, at least in their then state.

A learned French writer on this subject, M. Hautefeuille, cited by M. Ortolan, maintains that only arms "actuellement fabriquées, propres immédiatement et sans subir aucune préparation, aucune transformation par l'industrie humaine à être employées aux usages de la guerre," are contraband. But this rule M. Ortolan himself very properly disapproves of, and says, "Si les "matériaux propres à confectionner les armes, "les instruments ou les munitions de guerre, "sont tellement choisis et prépares, ou sont "portés dans des circonstances telles que la "fabrication ou l'usage auquel ils sont des-"tinées devienne incontestable, leur transport "en pièces ou par matériaux séparés, n'étant "qu'un moyen à éluder la défense, le capteur

(*g*) *Vide* Q. P. J. c. 10.

" doit être autorisé, quand les faits sont con-
" stants, à reconnaître dans ces objets une
" véritable contrebande de guerre" (*h*). *See Addenda* (*C*).

Coals, when contraband.

Coals are said by a learned authority (*i*) to be contraband under particular circumstances of the case, regard being had to its quantity and destination. In M. Ortolan's second edition of his work (*k*), they are treated as matters that ought not, on account of the great consumption now going on in the mercantile marine, to be considered as contraband, though in the first edition of that work he considered them as a munition indispensable and of a high class, and so contraband of war and in the first degree (*l*). But in full view of the principles of the law of contraband, as it is laid down and accepted by the English and American authorities, there is no difficulty or doubt as to this article, and it is clearly of that numerous class coming within the second degree of contraband, and which, as an article of a double or doubtful use, will in any given case be contraband or not according as the evidence bears out whether that particular cargo is intended for com-

(*h*) Ortolan, Règles Internationales, vol. 2, p. 206, 2nd ed.
(*i*) Phillimore on International Law, vol. 3, p. 361.
(*k*) Vol. 2, p. 206.
(*l*) *Ibid.*

mercial or general use, or whether, from its destination, the ship's papers, the known character of its owners as contractors for the government, or other legal evidence whatever, it is intended for supplying steam-vessels of war or for any other warlike application (*m*). Where it is the natural produce of the shipper's country it will be entitled to all the privileges we have pointed out in Chapter III.

(*m*) *Vide ante*, Chap. IV, and pp. 9 and 40.

CHAPTER X.

MONEY.

Money, when Contraband.
Vattel's exception in favour of Money-lending Nations.
Bonds, Bills, Notes, are no doubt Money.
Whether raising Money in this Country for a Neutral Belligerent Power is Unlawful.
The Case of Demetrius de Wutz v. *Hendricks.*

RULE—*Money, and what stands for money, in contraband of war, are liable.* The rule as to money being contraband.

But as a thing of doubtful use it will require other evidence than that, as afforded in itself, of being destined for war (*a*). And proof of that money having been raised by the agents of a belligerent state, or that it is consigned to the ministers or agents of a belligerent state, would perhaps be the strongest evidence of its being destined to in maintaining of the war. So, if shown by any other means to be part of a sum to be raised by the government to carry on the war, it would, no doubt, be liable as contraband.

(*a*) *Vide ante*, p. 9.

Vattel's exception.

Vattel has claimed in favour of those lending money, under such circumstances, what in substance amounts to the privilege explained in our third chapter. He says, "that if the money belongs to a nation accustomed to lend it, and whose usual course of business or trade it was, it would be protected;" evidently classing it under the same principle as that which protects the natural produce or any other staple produce of a nation (*b*). But money going to a government in time of war is, no doubt, as the sinews of war, contraband in the first degree, the same as arms, and as such, as already explained, would not be entitled to that privilege (*c*).

Bonds, bills, notes, are no doubt money.

The authorities only speak of money as comprised in gold and silver, coined or in bars. But, no doubt, money in any form, in bonds, bills, notes or otherwise, if proved to be on the road to an enemy's country, to serve in support of the war, it would be the same thing.

Whether raising money in a neutral state is unlawful.

A very learned authority on the subject of International Law (*d*), after observing that the principles of law prohibit a neutral from assisting a belligerent with money, in the shape of a loan or in any other form, as much as assisting

(*b*) *Vide ante*, Chap. III., p. 12.
(*c*) *Vide ante*, p. 13.
(*d*) Mr. Phillimore's Intern. Law, vol. 3, p. 221.

him with arms, adverts to a case decided in the Common Pleas, where it was held contrary to law in this country, as contrary to the law of nations, for a person residing here to enter into engagements to raise money for the purpose of supporting subjects of a foreign state in arms against a government in alliance with our own. It was also held in that case that no right of action could be maintained on such a contract. That case arose out of a proposal for a loan to assist the Greeks in their struggle for liberty against the Turks in 1825 (*e*). And C. J. Best said, that the same point had been determined by the Lord Chancellor in a case then before him, as to an attempted loan by the Spanish patriots.

This decision, however, seems scarcely to be an authority in support of the position to its full extent in favour of which it is cited. For in both those cases one of the belligerent parties were in the nature, perhaps, of a mere rebel against their government, and to assist them with money or arms would be different to assisting an independent belligerent state. And this consideration might, perhaps, affect one of the belligerent parties now engaged in war in North

(*e*) See *Demetrius de Wutz* v. *Hendricks*, 9 Moore, Rep. 586.

America, namely, the Confederate party, though the acknowledgment and dealing with them by the British and French governments, which has already taken place, would preclude or emancipate us, perhaps, from now treating them as mere rebels.

And, independent of this difficulty in the question, it seems doubtful whether the mere obtaining the loan of money in a neutral country, more than the obtaining the loan of or the purchase of anything contraband of war there, is unlawful. For even the sale of arms to a belligerent by a neutral is lawful in his own country or elsewhere, subject to the belligerent right to seize them as contraband. To hold that the sale or loan of money to a neutral is unlawful, would be to hold a doctrine in contradiction to an universal and well-established principle in the law of nations, namely, that belligerents may buy arms even in a neutral state. Mr. Phillimore likens it and treats it the same as recruiting troops in a neutral country for one of the belligerents. But this, by the law of nations, is a doubtful point, and, in England, its interdiction rests rather on statute than on general law (*f*).

(*f*) See Phillimore's Intern. Law, vol. 3, p. 221.

CHAPTER XI.

PROVISIONS.

When Provisions are Contraband of War.
Opinions of Grotius, Vattel and Valin.
Modern French Law as to.
Former Law in England as to.
Disputes between England and America in the Great War.
Modern English Law as to.
The same doctrine held by the American Courts.
Distinction between English and Foreign Law as to Provisions.
Corn, Wine and Oil.
Cheese, Salt Butter and Salt Fish.
Salt Beef, Salt Pork.
Biscuits, Flour, &c.

RULE—*Provisions going as provend for armies or navies are lawful prize.* The rule as to provisions.

Mr. Phillimore, with a certain generous enthusiasm for difficult questions in Jurisprudential science, calls that, as to provisions being contraband or not, *nobilissima juris gentium quæstio* (*a*).

Grotius, as we have already seen, places provisions in his second class as things which serve both for peace and war, and which will therefore be contraband according to circumstances; as if entering an invested place. Opinions of Grotius, Vattel and Valin.

(*a*) Vol. 3, p. 335.

Vattel says that provisions, under certain circumstances, may be contraband (*b*). Pothier says that they are not contraband, nor subject to confiscation, "Sauf dans un seul cas, qui "est lorsqu'elles sont envoyées à une seule place "assiégée ou bloquée" (*c*). Valin says that they are, by the law of France and the common law, only interdicted to besieged places (*d*).

By the Treaty of Utrecht, between Great Britain and France, renewed from time to time down to 1783 (*e*), all sorts of grains, legumes, and generally all provisions serving for the nourriture and subsistence of men were excepted from contraband.

The French modern law as to.

And it is so still in the modern French interpretation of the law of nations. M. Ortolan says:—"Que les vivres et tous objets de pre-"mière nécessité ne peuvent en aucun cas, et "pour quelque motif que ce soit, être rangés "dans le contrebande de guerre, sauve les droits "résultant de blocus" (*f*). *See Addenda* (*A*).

The former law of England as to.

In England, however, the law has always been more stringent. Sir William Scott, in the

(*b*) Lib. 3, c. 7, s. 103.
(*c*) Traité du Droit de Propriété, pt. 1, c. 2, ss. 2, 104.
(*d*) Lib. 3, t. 9, art. xi.
(*e*) *Vide ante*, p. 45.
(*f*) Vol. 2, p. 166.

case of *The Yonge Margaretha* (*g*), after observing that the catalogue of contraband had varied very much in early times, says that, in 1673, corn, wine and oil were held contraband by the Admiralty practice in this country; and that, in 1747 and 1748, butter, salted fish and rice were also contraband. In this conflicting and uncertain state of the practice of different nations a great question arose between England and the neutral powers in the war between Great Britain and France towards the close of the last century, and the question was sifted with all the learning and acumen of statesmen and publicists of the day. As this is likely to have a direct and important bearing in the war now raging in America in its relations with us as neutrals, and as it was precisely the Americans who then, as neutrals, took a leading part in it against us as belligerents, and their writers and Courts of Admiralty have dealt most learnedly with the question, it will be advisable to go somewhat fully into it.

Dispute between England and the Americans in the Great War.

It arose by the French Republic declaring, on the 9th of May, 1793, that neutral vessels laden with provisions, destined to an enemy's port, should be seized and carried into France.

(*g*) 1 Rob. Rep. 159.

By Instructions of the 8th of June, 1793, the English government gave similar orders to their cruisers. The fact of England having taken this step only in retaliation for that taken by France is, to some extent, a justification of what, perhaps, would otherwise be a proceeding somewhat against the law of nations, and one which the government itself ultimately abandoned or qualified, and her own Courts and most eminent authorities decided against. For, notwithstanding the able and eloquent argument put forward by Count Bernstorf on behalf of the Danish Court, claiming from the English government the right of neutrals towards them irrespective of what France might do, it has often been admitted by writers on the subject and in practice, that where one of two belligerents abandons a right and lawful course, the other is justified, to some extent at least, on the ground of necessity, if not strict law, in doing so likewise.

The English Orders in Council directed the cruisers to stop all vessels laden wholly or in part with wheat, flour or meal bound to any port in France, and to send them to a British port to be purchased by the government, or to be released on the condition of the master

giving security to dispose of his cargo in the port of some nation in amity with his Britannic Majesty. This order was sought to be justified on the ground that, by the modern law of nations, all provisions were contraband in the first degree, whenever the depriving an enemy of them would sooner reduce him to terms. And it was contended that, in that particular case, it was the more justifiable to cut off such supplies, because it was notorious that the grain and flour really belonged to the government of France, who had purchased it by their agents; and that, as the government had called upon the whole nation to arm in their defence, the British Cabinet was the more justified in treating the whole nation as a military force. The northern powers, Sweden and Denmark, opposed this energetically; and the United States, by their diplomatic agents, replied that neutrals, in time of war, retain all the rights they had in time of peace to trade with either belligerent, so long as they do not supply arms or ammunition, or other means of defence or offence to either party; and that, especially, each ueutral had a right to export to where it pleased its usual and staple commodities of produce, the market

of which it could not be deprived of (*h*). And they further said, that the law adverted to by the English government, as laid down by Grotius and other publicists, as to the right to interdict provisions to an enemy, only applied to cases where the enemy were cut off completely from supplies, and that for the want of such they were likely to be reduced to surrender. This only took place, they said, in regularly invested fortresses or towns, and not where a whole nation was blockaded only on one side of its coast or frontier, and still capable of availing itself of its own resources for an indefinite time, or supplying itself along its other frontier to an indefinite extent. And as a proof of which they pointed to the fact that provisions in France were dearer than in England (*i*).

There is little doubt but that the English government were wrong, and indeed they admitted it by the treaty afterwards settled with the United States in 1794, in which it was, by Article 18, agreed that whenever provisions and other articles, not generally contraband, should be seized by the British cruisers they

(*h*) *Vide ante*, Chap. III. p. 12.
(*i*) *Vide* Wheaton's International Law, vol. 2, p. 195, 1st ed., and Phillimore's International Law, vol. 3, pp. 335—349.

were not to be confiscated, but the owners were to be completely and speedily indemnified, and the captors, or in their default the government, were to pay to the masters or owners of such vessels the full value of all such articles, with a reasonable mercantile profit thereon, together with freight and demurrage for the detention. And Sir William Scott, in the case of *The Haabet* (*k*), and the American government have frequently declared that treaty as only declaratory of the law of nations (*l*).

Modern English law as to.

The English Prize Courts, which had gradually been relaxing their practice under the direction of Sir William Scott, adopted a more generous policy as to neutrals towards the middle of the great war. In the case of *The Yonge Margaretha* (*m*), that learned Judge, after reviewing the practice of the Admiralty Courts in this country, in manifest contemplation of the authorities of the Jurisprudentists, placed the question upon those sound and broad principles which we have already so often adverted to, as he did so many others of the law of nations, which till then had been enveloped in

(*k*) 2 Rob. 182.
(*l*) *Vide* Kent's Commentaries, vol. 1, p. 140, and *vide ante*, p. 58.
(*m*) 1 Rob. 159, Phill. ed.

a mist of futile and indefinite arguments. The practice and principle which he then established have been accepted by all the American Courts and the American writers on this subject, whose respect they commanded by their admirable lucidity and firmness. Following Grotius' rule (*n*), he held that provisions were the same as all other articles of a doubtful or double use, that is, capable of being applied either to peace or war; and that, therefore, subject to the considerations of their being the growth of the exporter's country, pointed out in our third chapter of this work, and subject to the conditions, pointed out previously (*o*), as to whether they were in a prepared or raw state, it was simply a question of evidence or probability in each case, and whether those very articles were intended for ordinary use in life, or even for mercantile ships' use, or whether they were going, with a highly probable destination, for military or naval use, and that that would decide whether they were contraband or not. This is placing provisions on the same rule as all other goods of the second class of contraband before pointed out (*p*). And the

(*n*) *Vide ante*, p. 8.
(*o*) *Vide ante*, p. 36.
(*p*) *Vide ante*, pp. 9, 13, 73.

port of destination in this, as in all other cases, will be an important ingredient, among others, in determining what the ultimate use of the goods is intended to be, as in Chapter III.

The same doctrines held in the American Courts.

These doctrines, and a practice in pursuance of them, have been cited and followed by the Courts of the Admiralty, United States:— "When they came to know and feel the value of "belligerent rights, by becoming a party to a "maritime war" (*p*). And in a case that was decided after the delivery of the above-mentioned judgments of Sir William Scott, Judge Story held, that a Swedish, that is, a neutral, vessel, carrying provisions to the English army in Spain, the provisions being also neutral property, but destined as supplies for the military force of an enemy, even though in a neutral country, Spain—the English and Americans being then at war, were contraband, and liable to confiscation, especially as the provisions were the growth of an enemy's country (*q*). And that great American authority pointed out in the words almost of Sir William Scott, used in *The Yonge Margaretha*, that if they had appeared to have been destined for the ordinary

(*p*) Kent's Comm. vol. 1, p. 148, 10th ed.
(*q*) *The Commercen*, 1 Wheaton's Rep. 383.

use of life, they would not have been contraband. And the same doctrine was acknowledged and confirmed by the American Courts in the case of *Maisonnaire* v. *Keating* (*r*).

The existing law as to provisions.

The principles and practice of the English and American Courts of Admiralty, therefore, as to provisions, is clear, namely,—

First. That all provisions taken with a probable destination of being used as provend for an enemy's military or naval force, will be contraband.

Secondly. That, as held by Grotius and other Jurisprudentists, provisions on a voyage to a besieged fortress or city, regularly invested, and with a probability of being reduced by famine, will be liable to confiscation. Yet,

Thirdly. Such provisions, when on a voyage to a coast or open country, only blockaded on one side, and so blockaded with a view of generally annoying or destroying the people of it, rather than with any probability of reducing it by famine, will not be contraband, so as to be liable to confiscation, and only liable to be taken on pre-emption (*s*), that is, on payment of value, freight, profit and demurrage.

(*r*) 2 Jallison's American Rep. 325.
(*s*) *Vide post*, p. 91.

Fourthly. That by the law as interpreted by other foreign nations, by their writers, Grotius, Bynkershoek, Valin, Vattel, Ortolan, Massé and others, provisions will never be contraband except on the road to a blockaded place or port. And by that probably would be meant a regularly invested place or fortress, or at least when taken on an attempt to break a regular blockade, in which case the vessel and cargo would be liable on other grounds.

Another distinction between the English and American law and that of France and other states is, that, for belonging to the second class, the Dutch and French authorities require especial or more particular circumstances, as, that the provisions should be going to an invested place, sought to be reduced by famine. But the English and American authorities only demand some special or more particular evidence of an ordinary military or naval destination. With them the only further ingredient required is only evidence, not of the thing evidenced.

Corn, wine, oil and butter, salted fish and rice, were condemned as contraband under the old system (*t*). And so they would be contra- Corn, wine and oil.

(*t*) See Kent's Comm. vol. 1, p. 143, 8th ed., and *The Yonge Margaretha*, 1 Rob. 159.

band now, no doubt, under the circumstances which make other provisions such, as being preserved provisions going to a naval port, or with other warlike evidence.

Cheese, butter, salt fish.

Cheese has been held not to be contraband as a general rule, and beer also (*u*); and this on the broad principle that they were articles of luxury and not of subsistence, and as such could not be held as assisting the enemy in his defence (*v*). But if the cheeses be such as are commonly used as naval stores or provisions, then they would be no longer considered as mere luxuries (*x*). And if going to a port of outfit, like Brest or Rochelle, they will be liable to be seized as contraband, and the vessel also which contains them, if belonging to the same owner (*y*). Butter, salted cod, and like stores are liable to the same rule if going to a port of equipment (*z*); and apparently wine and oil (*a*). In all these cases, if the goods seized be the natural produce of the country, that will be a mitigating circumstance (*b*). And if going to a

(*u*) *The Yonge Margaretha*, 1 Rob. 159, and the cases there cited.
(*v*) *Ibid.*
(*x*) *Ibid.*
(*y*) *Vide post*, tit. EFFECT OF.
(*z*) *Per* Sir William Scott in *The Yonge Margaretha.*
(*a*) *Ibid.*
(*b*) *Vide ante*, Chap. III.

general port, or a port used as such, as well as a port of equipment, they will not be liable to be seized (*c*).

Salt beef was held to be such provisions as will be contraband in going to an hostile port of naval equipment (*d*). And, in the latter case, it was admitted by counsel, on the other side, that salt beef, as produce in a prepared state, was contraband, if going to a port of outfit. Salt beef, salt pork.

So biscuits and flour are liable to confiscation if going to an enemy's port of general commerce, as Cadiz. And, where the vessel was sailing under false papers, and there were other symptoms of bad faith, the vessel itself was forfeited (*e*). But it is otherwise where the papers are regular and good faith is observed (*f*). Biscuits, flour.

From this it is manifest that, by the English and American law, provisions will be contraband or not, the same as all other articles of a double or doubtful application, in proportion as the evidence in any case is in favour of their being or not being destined for warlike application, or the support of military or naval arma-

(*c*) *Vide ante*, Chap. IV.
(*d*) *The Vriendschap Jansen*, cited *arguendo* in *The Yonge Margaretha*, 1 Rob. Rep. 188.
(*e*) *The Vigilantia*, 6 Rob. 125.
(*f*) *Vide post*, Chap. XIII.

ments. And this evidence may arise from their nature alone, as rations made up in some way especially, and openly used only for such purposes, as salted beef and other marine stores; or their nature taken in connection with other facts, as their destination to a port of naval equipment; or even the character of the owners or consignees, as if they were known contractors for such articles with the government.

CHAPTER XII.

THE DOCTRINE OF PRE-EMPTION.

Rule as to Pre-emption.
Applies to all Goods of the Second Degree of Contraband.
Origin and importance of the Doctrine.
Applies to all Goods of a doubtful Character.
When it can be enforced, and when it can be claimed.
How carried out.
What allowed as probable Profit.
Price of Insurance, when allowed.

RULE—*In contraband, whatever may be of use in war may be taken on payment.* Rule as to pre-emption.

The doctrine of pre-emption, or the right of taking all goods capable of warlike use when on the road to an enemy, on payment of their value, was much more common in past times than it is at present, and was then, it is said, applied to contraband of war in the first degree, or what was then considered such (*a*). And this right of taking possession of cargoes of provisions or other goods going to an enemy's port is not peculiar to this country and the United States, though it was the subject-matter of treaty between them in 1794, but is part of the general

(*a*) See Phillimore's International Law, vol. 3, p. 362.

law of nations (*b*). And it was the subject of many important treaties between this country and Spain, Holland and Portugal in the seventeenth century (*c*).

Belligerents always now claim and exercise the right of confiscating, that is, seizing without any indemnification whatever, all goods contraband of war in the first degree, that is, all arms and ammunition, or what can solely or directly and immediately serve as such (*d*).

Origin and importance of the doctrine.

Pre-emption, it is said, is to be looked upon as a sort of compromise in doubtful and difficult cases, in which, while on the one hand supplies which may increase his means of defence or attack are prevented from going to the enemy, on the other hand neutral owners do not suffer by the loss of their goods (*e*). And no doubt but that in all difficult cases, and whenever there is no fair evidence of a guilty intention on the part of the neutral vessel having the objectionable goods on board, this is the proper and only course which the law points out. For confiscation is a proceeding *in pœnam*, and can only be justified where there is a guilty

(*b*) *Per* Sir William Scott, in *The Haabet*, 2 Rob. 182.
(*c*) Phillimore's International Law, vol. 3, p. 362.
(*d*) *Vide ante*, Chap. VI.
(*e*) See Phillimore's International Law, vol. 3, p. 363.

intent manifested of the owner to commit a breach of international law by conveying means of offence and defence to the enemy. And where from the character of the goods, as serving other or various other purposes, and the want of further evidence as to their warlike destination, this is not sufficiently made out, and yet the belligerent claims to interdict such goods from the enemy as those which *may* be made use of against him, this is the proper and most reasonable remedy. And it is, no doubt, in the greater development of this principle and its restoration to that more general practice which it held in the seventeenth century, that a mitigation of the law of contraband, and the reconciling of its principles and practice here with those of foreign countries, will be best secured.

Applies to all goods of doubtful character.

Though the doctrine of pre-emption has in recent times been applied almost entirely in cases of provisions, wheat and flour, more particularly under the treaty with the Americans and Sweden above referred to, the principle is, no doubt, applicable to all cases of goods of a doubtful or double character, and which are capable of being used in war. And as a proof

of this, in the case of *The Sarah Christina* (*f*), Sir William Scott applied it to a cargo of pitch, tar, iron hoops and bars from Sweden, a case of great doubt and difficulty as to the ownership of the property.

When it can be enforced, and when it can be claimed.

The right to take on pre-emption only applies to vessels which are avowedly or on a fair presumption on the road to an enemy's port (*g*). And it can only be claimed by the owner of the cargo in cases where perfect good faith has been kept, and where the ship's papers and her course are in strict order and accord (*h*).

How carried out.

The mode of ascertaining the value of the cargo and charges incurred is by a commission appointed by the Admiralty Court, consisting of a registrar of the Court and merchants resident in the belligerent port, possessing a full knowledge of the articles and course of trade, who make their report to the Court above (*i*).

What sum allowed for profit.

As a general rule all charges and prices of the articles are calculated in the same way that they would be if the goods had gone into port

(*f*) 1 Rob. 237.
(*g*) *Per* Sir William Scott, in *The Haabet*, 2 Rob. 174.
(*h*) *The Sarah Christina*, 1 Rob. 241. *Vide post*, Chap. XIII.
(*i*) *Per* Sir William Scott, in *The Haabet*, 2 Rob. 179.

in the usual course of business (*j*). But not always, and a neutral cannot exact such an unreasonable price, or what are called distress prices, for his goods as he would have realized perhaps if they had succeeded in entering the enemy's country (*k*). And an expected value at the port of delivery is not always the necessary measure for compensation at the port of the belligerent (*l*). The invoice price of the goods and ten per cent. on that for profit is what was allowed on wheat as reasonable (*m*). This was the sum agreed upon as such by the treaty between the United States and England in 1794, and likewise, also, by treaty between England and Sweden in 1803 (*n*). But the sum to be allowed as a profit that might fairly be expected as likely to have been realized if the vessel had entered her port, must depend upon the nature of the cargo and other circumstances, where there is no treaty fixing it beforehand. In the case of *The Haabet* (*o*), Sir William Scott said, "It is a reasonable indemnification "and a fair profit on the article, that is, due

(*j*) *Per* Sir William Scott, in *The Haabet*, 2 Rob. 179.
(*k*) *The Haabet*, 2 Rob. 182.
(*l*) *Ibid.* 184.
(*m*) *Ibid.* 174.
(*n*) See Phillimore's Intern. Law, vol. 3, p. 263.
(*o*) 2 Rob. 182.

" reference being had to the original price actu-
" ally paid by the exporter, and the expenses
" which he has incurred. As to what is to be
" deemed a reasonable indemnification and pro-
" fit, I hope and trust that the country will
" never be backward in giving a liberal inter-
" pretation to these terms; but certainly the
" captor's nation does not always take the car-
" goes on the same terms on which an enemy
" would be content to purchase them."

Price of insurance, when allowed.

And though the price of insurance of the cargo will be also allowed when it has been paid, or even where the shipper has been his own insurer, if the risk has been run, it will not if the vessel has, by being seized at the early part of the voyage, never incurred a risk (*o*).

(*o*) *The Haabet*, 2 Rob. 184. See also the cases of *The Maria Magdalena*, Hagg. & Marriott's Adm. Rep. 250; *The Vryheid, ibid.* 188; and *Vrow Antoinette, ibid.* 142.

CHAPTER XIII.

ATTEMPTS AT FRAUD.

Importance of avoiding.
What are such attempts.
Vessel out of her Course.
Destroying Ship's Papers.
Effect of Fraud.
What is Evidence of Fraud.

RULE—*Fraud forfeits all neutral rights.* Rule as to fraud.

It is of the very first importance to all shippers of goods to a belligerent state to avoid all attempts at fraud and concealment; such as chartering the vessel nominally to one place with an intended voyage to another; double instructions to the captain; concealing the real character of the goods; hiding some that are contraband under others that are not. So in *The Calypso* (*a*) and *The Eensom* (*b*), the effect of false destination and covering enemy's goods by neutral's, by mixing them up with the neutral's own, was held to work a forfeiture.

One of the chief evidences of fraud is a vessel's being out of the regular course from Vessel out of her course.

(*a*) 2 Rob. 154. (*b*) *Ibid.* 14.

that in which she ought to be going if on her road to her destined port, as shown by her papers. And the Courts will examine experienced persons as to their opinion as to this, and would be guided by it.

Destroying ship's papers.

A common attempt at fraud is the destruction of the ship's papers, when taken out of her course. "It is certain," said Sir William Scott, "that, by the laws of every maritime Court in "Europe, spoliation of papers not only excludes "further evidence, but, *per se*, infers condem-"nation. But by the English law, if all other "circumstances are fair and clear, this circum-"stance alone will not work a forfeiture. But "it nevertheless generates, in that case, a most "unfavorable presumption" (*c*).

The effect of fraud.

The effect of fraud will be, in most instances, to condemn the ship, which, in all other cases, generally would go free, even though the goods were confiscated. And in most cases it will condemn goods, which otherwise might have been free, or liable to pre-emption only. Its result, also, is to deprive at once a neutral ship of all her rights and privileges whatsoever, and all kind of favourable consideration.

(*c*) *Per* Sir William Scott, in *The Hunter*, 1 Dod. Adm. Rep. 486.

What is evidence of fraud.

However regular the papers of a vessel be, and however well documented the ownership of the property, if, from the examination of the master, his prevarication and suppression of evidence, and manifest falsehood as to some points, and if, from the known character of the owners and agents of the vessel, as connected with contraband trade, or from the admitted double instructions given to the captain, there be fair reason to doubt them, they will be disregarded (*d*). And if there has been a suppression of the enemy's interest, with a fraudulent view, the party engaged in that fraud will not be permitted to prove that his own property is mixed up with it, and it will all be condemned (*e*).

(*d*) *The Nancy*, 3 Rob. 122.
(*e*) *The Graaf Bernstorf*, 3 Rob. 117.

CHAPTER XIV.

PENALTY FOR CARRYING CONTRABAND.

Ancient and Modern Practice as to.
Where Goods and Ships have different Owners.
Contraband confiscates innocent Goods of the same Owner.
Mr. Kent's Summary of the Laws as to the Penalty of Contraband.

Rule.

RULE—*Contraband confiscates all of the same bulk and of the same owner.*

By the ancient rules contraband forfeited the vessel in which it was carried, and even all the innocent articles which accompanied it (*a*). But in modern practice the rule is, that where the ship belongs to a different party to the owner of the contraband goods, and he has observed good faith in all her proceedings, and there are regular ship's papers, and she is on her proper course, the only punishment she will incur will be that of a loss of her freight and the expenses of a bootless voyage.

Where ship and the goods have different owners.

Contraband confiscates the innocent goods of the same owner.

But even now, having contraband articles on board confiscates the ship and the innocent

(*a*) See Kent's Commentaries, vol. 1, p. 146, 8th ed.; Bynkershoek, Q. P. J. c. 12—14; Phillimore's International Law, vol. 3, p. 571.

property in her, if belonging to the same party who is owner of the contraband goods, but not if the contraband belong to another party (*b*). And the allowing the contraband goods to go unclaimed will have no avail, if there is proof that they belong to the owner of the others, who was also a part owner in the vessel (*c*).

If the contraband goods belong to persons not the owners of the vessel, according to the more modern practice, the goods only are seized, even where the articles are expressly contraband, as pitch and tar, and the ship goes free with a loss of her freight as punishment (*d*). Unless there have been peculiarly aggravating circumstances of falsehood and fraud, or as to papers and destination (*e*). This modern leniency in favour of trade is in opposition to the great authorities Bynkershoek and Heineccius (*f*). A false destination entered on the papers is such a fraud as will preclude lenient consideration and work a forfeiture (*g*).

(*b*) *Per* Sir William Scott, in *The Staadt Embden*, 1 Rob. 31; and see Bynkershoek, Q. Pub. J. lib. 1, c. 12; and *The Oster Risoer*, 4 Rob. 199.
(*c*) *The Yonge Tobias*, 1 Rob. 329.
(*d*) *Per* Sir William Scott, in *The Regende Jacob*, 1 Rob. 91; *The Yonge Tobias*, 1 Rob. 330.
(*e*) See above cases and *The Mercurius*, 1 Rob. 288.
(*f*) *Ibid.*
(*g*) *The Sarah Christina*, 1 Rob. 237.

Where some sailcloth, which was clearly contraband, belonged to the same owner as some linseed, which was not contraband, the latter as well as the former was confiscated (*h*).

Where part of the cargo was held contraband, but whether so or not turned on the new construction of a treaty, Sir William Scott would not adjudge other articles belonging to the same party to confiscation (*i*).

Mr. Kent's summary.

The effect of carrying articles contraband of war by the modern practice and interpretation of the law of nations, is thus summed up by a learned and accurate American authority, Mr. Kent:—

"Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the innocence of any particular article is not usually admitted to exempt it from general confiscation. By the ancient law of Europe, the ship also was liable to condemnation; and such a penalty was deemed just, and supported by the general analogies of the law: for the owner of the vessel had engaged it in an unlawful commerce, and contraband goods are seized and con-

(*h*) *The Oster Risoer*, 4 Rob. 199.
(*i*) *The Charlotte*, 5 Rob. 275.

demned *ex delicto.* But the modern practice of the Courts of Admiralty, since the days of Grotius, is milder, and the act of carrying contraband articles is attended only with the loss of freight and expenses, unless the ship belongs to the owner of the contraband articles, or the carrying of them has been connected with malignant and aggravating circumstances; and among these circumstances a false destination and false papers are among the most heinous. In those cases, and in all cases of fraud in the owner of the ship, or of his agent, the penalty is carried beyond the refusal of freight and expenses, and is extended to the confiscation of the ship and the innocent parts of the cargo. This is now the established doctrine, but it is sometimes varied by treaty, in like manner as all settled principles and usages of nations are subject to conventional modifications" (*k*).

(*k*) Kent's Commentaries, vol. 1, p. 146, 8th ed., referring to Bynkershoek, Q. P. J. b. 1, c. 12, 14, and Heineccius de Nat. ob. rect. c. 2, s. 6, and *The Staadt Embden*, 1 Rob. 23; *The Yonge Tobias*, 1 Rob. 277; *The Franklin*, 3 Rob. 217; *The Neutralitat*, 3 Rob. 95; 4 Rob. 68; 6 Rob. 125.

ADDENDA.

(A)—Page 59.

Rule as to Doubtful Goods of a Doubtful Owner to a Doubtful Port.—(CHAPTER IV.)

THE rule adverted to and explained in this chapter, as an important principle of the English and American law of contraband, has been ignored by some writers, especially the French authors. But this arises from their ignoring altogether, as they generally do, contraband of war in the second degree, or any other contraband but what are arms or ammunition, or what is in the nature of them. M. Ortolan openly assails the doctrine of contraband in the second degree, and especially opposes the doctrine of the character of the goods being affected by their port of destination. But another very learned French authority, M. Massé (*a*), holds otherwise. He says, " C'est donc en définitive leur destination " qui leur imprime leur caractère; et comme cette " destination n'est jamais avouée par ceux qui les " transportent à l'ennemi, il en résulte que la preuve " doit s'en induire des circonstances de temps et " de lieu dans lesquelles le transport à l'ennemi s'en " effectue, des quantités emportées, de la nature des " besoins, et du genre de guerre." The same doc-

(*a*) Droit Commercial, vol. 1, p. 211.

trine is held by M. Tetens in a very learned treatise on the subject of International Law, the ablest on the subject of contraband there is perhaps. He says that "Articles are not liable to confiscation "because they are useful or necessary to military "service; but they are so, as has been said before, "by their being actually destined for the enemy, "either openly so or as indicated by their true "nature, by their quality or by their quantity, which "would not agree with their being destined for "another purpose" (*b*). And that learned author even holds that any goods, contraband or not, on the road to enemies' forces for military service are liable to confiscation (*c*).

Mr. Wheaton observes in his work on International Law that the principle established by Sir William Scott in *The Yonge Margaretha*, as to articles of promiscuous use being considered contraband when on a destination to a port of naval equipment, seems to have been abandoned by him in a subsequent case (*d*). It may be observed, first of all, that the principle, right or wrong, has been distinctly acknowledged and acted on by the American Supreme Court in the case of *The Commercen* (*e*) and that of *Maisonnaire* v. *Keating* (*f*), and by Mr. Kent in his Commentaries (*g*); and in *The Commercen* it was made to apply to naval ports in a neutral country. The principle above adverted to was not

(*b*) Page 115. Considérations sur les Droits Réciproques, p. 113. Copenhagen, 1805.
(*c*) Page 114.
(*d*) *The Charlotte*, 5 Rob. 305.
(*e*) Wheaton's Adm. Rep.
(*f*) 2 Jallison's American Rep. 325.
(*g*) Vol. 1, p. 143.

acted upon in one case only by Sir William Scott, but in all on contraband, where the question arose upon goods of a double or doubtful character. It was an established principle with him. In the case adverted to, *The Charlotte*, the goods were marine stores contraband essentially in the first degree, and as such contraband going to any port, not goods of a double or doubtful character, or at least such as were by the English law considered such (*h*). And although the reasoning of Sir William Scott, adduced in *The Charlotte*, goes to weaken the arguments and practice he so often adopted in other cases, viz., "that, though going to a general port, the goods might be there used for privateers or shipped to a naval port," that view cannot be taken as overthrowing his numerous judgments and general course of practice established in other cases. As to the force of the arguments the learned judge there uses in support of his decision, it only goes to show that the rule which allows *doubtful goods* to go to a *doubtful port* will not always give belligerents that protection it should, and will frequently be abused by neutrals, by such goods being sent on from there to a naval port. But this does not materially affect the question in cases where they do find such goods going to a naval port, or prevent them treating them as contraband. Belligerents are placed in a difficult situation; they are driven, in their own defence, to stop all contraband they possibly can, and they are compelled by fairness and consideration for neutrals to avoid doing this more than is necessary for their own protection. If they

(*h*) *Vide post*, tits. MARINE STORES, p. 113; MASTS, p. 59.

cannot intercept all, that is no reason they shall not intercept some, and a little will go very far when the loss is so great. And certainly warlike goods or warlike stores or provisions going in large quantities to a place of warlike naval or military equipment give rise to a very strong presumption, and such a one as, with previous notice to the party taking them there of their danger, they have a right to act upon. It is no fair argument in such cases to say, why do you not seize all other such goods going into a *general* port? because there is not the same amount of evidence of their warlike destination. And, as said by Sir William Scott, "As it is im- "possible to ascertain positively the final use of an "article *ancipitis usus*, it is not an injurious rule "which deduces the final course from the imme- "diate destination."

(B)—Page 36.

Things solely applicable to War.

All the foreign modern authorities, Hübner, Tetens, Ortolan, Massé, and the learned editors of the edition of Valin, 1844, agree in holding that only such articles are contraband of war,—that is, in the first degree, in which sense the French authors only use the term,—as are *directly* and *solely* applicable to war purposes. M. Ortolan, in page 171, vol. 2, of his work, points out that in all the treaties concluded between civilized nations since 1815, as to contraband of war, that term and its consequences are restrained to arms and ammunition, that is, contraband of war in the first degree. These are mostly between the European maritime states, France,

Prussia, the Hanseatic Towns and the United States of America, and the various states of South America, Brazil, Columbia, Mexico and Bolivia, which have of late years been so incessantly engaged in conflict, so that such treaties are numerous.

" Ce qu'il a," say the learned editors of the Traité des Prises of Valin, 1844, " de plus grave, " c'est la diversité des doctrines Anglaises et " Françaises: elle tient les neutres dans l'incertitude. " Peuvent-ils transporter des objets de matériel " naval? Oui, s'ils interrogent la législation Française. " Non, s'ils interrogent la loi Anglaise" (*i*). And they then go on to remark, apparently with some regret, that all sorts of machinery for propelling vessels and coals must, as things in the nature of marine stores, by the French law not be contraband, though they are with us.

No doubt but that if the English and American Courts would adopt and enforce more stringently, as a fixed and general principle, the holding, as of the first degree of contraband, only such things as are solely and directly applicable to war, the loose, vague and indefinite state of the law as it now stands would be much cleared up. And this would be all the more important step, as by so doing a great advance would be made towards reconciling the principles of those Courts with those of the Courts of France and Germany. And if these latter, again, in compensation, would adopt our principle of holding that goods, though even of a doubtful or double purpose, or serviceable for peace or for war, would, on fair and reasonable proof of a hostile destination,

(*i*) *Pistoye* and *Duverdey*, Traité des Prises, vol. 1, p. 405.

become as much contraband of war as if such a destination were apparent as in themselves, the reconciliation of the two great systems would be complete, at least as to their great leading principles, and the civilized nations be said to live under one branch of universal Jurisprudence. Indeed it is difficult to conceive that the American and English Courts will long hold that a cargo of ship timber, or of sails, cordage, tar or hemp, things applicable to such numerous purposes, and quite as applicable, and even far more likely, to be applied in constructing commercial ships, will be contraband in the first degree, that is, as liable to confiscation, without any further proof whatever of being intended for ships of war. Nor will, perhaps, the French authorities (*k*) long continue to hold that goods of the second degree, or of a double use, for peace as well as war, such as marine stores, provisions, &c., if taken on a manifest destination for use in war, as on the road to an enemy's port of naval equipment, or provisions on the road to the enemy's forces or navies, and so manifestly intended for supplies, will not be liable as things aiding and assisting such enemy in his defence. And if this be so it is really decided, and it becomes a question merely of degree of evidence in each case, the same as it is with us in most cases now.

(*k*) See M. Ortolan's argument against this principle of English law, in vol. 2, p. 191, 2nd ed. of his valuable work. M. Ortolan seems to think that it is only the English Courts who have adopted this principle, but in this he errs. Hübner, a Dane, and whose work of all others exhibits a profundity and calmness in examination, maintains the same principle. See La Saissie des Bâtimens, lib. 2, c. 1, ss. 8, 9. And this, as observed elsewhere, is also the theory of M. Tetens, in his work cited above.

(C)—Page 38.

Raw or Manufactured Goods.

M. Tetens, a learned Danish author on this subject, says, "whether the objects are already fabricated and are fit for immediate application or immediate use, or whether they are still in a raw state, *des matières brutes*, which require another touch, *une nouvelle main d'œuvre*, to become so, that does not alter their quality from the moment their destination for warlike purpose becomes manifest" (*l*). And he then instances saltpetre and sulphur, observing, "though things much used in other matters, that if they were found going to the enemy's country, with a probable destination for war, they are contraband." M. Massé (*m*) says that all things serving for the military equipment of men and horses are contraband of war, "but with the condition that they are finished," because in their primary state their warlike utility is not sufficiently determined. He nevertheless classes, as in the first degree of contraband, saltpetre and sulphur, because they only require "the mixing" to make them into powder. That is rather a forced construction of powder making, however.

(D)—Page 48.

Sulphur and Saltpetre.

M. Ortolan, in his work so often referred to, says, that in the modern treaties between the United

(*l*) Considérations sur les Droits Réciproques des Belligérents, etc. Copenhagen, 1805, p. 111.
(*m*) Droit Commercial, vol. 1, p. 209.

States and the South American Republics, and between France and those Republics, which are the only recent treaties as to contraband of war, all the most important and most recent ones consider only arms and ammunition of war as contraband, but that right or wrong they include saltpetre among the latter, and sometimes sulphur.

M. Tetens instances saltpetre and sulphur as things which, though in their raw state, are contraband of war the moment that their destination of warlike purposes appears, manifestly placing them in the second class, as seen in the last page (*o*).

(E)—Page 56.

Secreting Despatches.

A neutral vessel carrying despatches from the governor of one of the enemy's colonies or provinces to the home government is liable to confiscation, and the cargo also, if it belongs to the same master, especially if such were concealed (*p*). But this does not apply to despatches on board a neutral ship, but going from the consul of the enemy's state resident in the neutral state (*q*). And the legal presumption in such case is, that the despatches have reference to the commercial relations of the belligerent and neutral state (*r*).

(*o*) Considérations sur les Droits Réciproques, etc. Copenhagen, 1805, p. 111.
(*p*) *The Atalanta*, 6 Rob. 440.
(*q*) *The Caroline*, 6 Rob. 461.
(*r*) *The Madison*, Edwards, Adm. Rep. 224.

(F)—Page 61.

Marine Stores.

Under the denomination of marine stores will also come, no doubt, yards, tops and all sorts of round timber and stumps for bowsprits and wood fit for ship-building, if made up, or otherwise clearly destined for use in rigging vessels. And also, mill-rods for oars, knee timber and crooked timber of what quality soever, blocks of oak, or beech wood for blocks; and all other timber used and known in the trade, from its size, cut and quality, as specially adapted for ship-building. So fir planks, battens and firewood, if on the road to a port of naval outfit, and if certified by competent persons, that is, those employed by the government of the place where the prize lies, to repair their vessels, and if there be none such respectable shipwrights of that place, to be—"properly ship-timber,"—will be liable to confiscation.

And by the Treaty of 1794, between Great Britain and the United States (before referred to, p. 58), timber for ship-building, tar or resin, copper in sheets, sails, hemp and cordage, and generally whatever serves directly for the equipment of vessels, unwrought iron and fir planks only excepted, were declared contraband.

The question of marine stores being contraband of war or not was long a vexed one, and prolific of diplomatic difficulties between Great Britain and the northern powers, Sweden, Denmark and Russia, whence supplies of those articles were shipped to every part of belligerent Europe, and were continually being seized by the British cruisers. This re-

sulted at last by the famous combination called the Armed Neutrality of the Northern Powers, which terminated by a compromise, those powers abandoning their rule, that "free ships made free goods," whilst England conceded among other points, that naval stores of all sorts being, as between the contracting powers, and without prejudice to relations existing with other powers, should not be contraband.

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